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**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1983

GEORGE STEWART and LEE ROY WARREN,
on behalf of themselves and all others
similarly situated,

Petitioners,

vs.

NATIONAL SHOPMEN PENSION FUND,
A. S. GOODWIN, SAMUEL SPADEA,
KENNETH STEWART, DENNIS R. TONEY,
RICHARD A. SMITH, W. J. MUSE,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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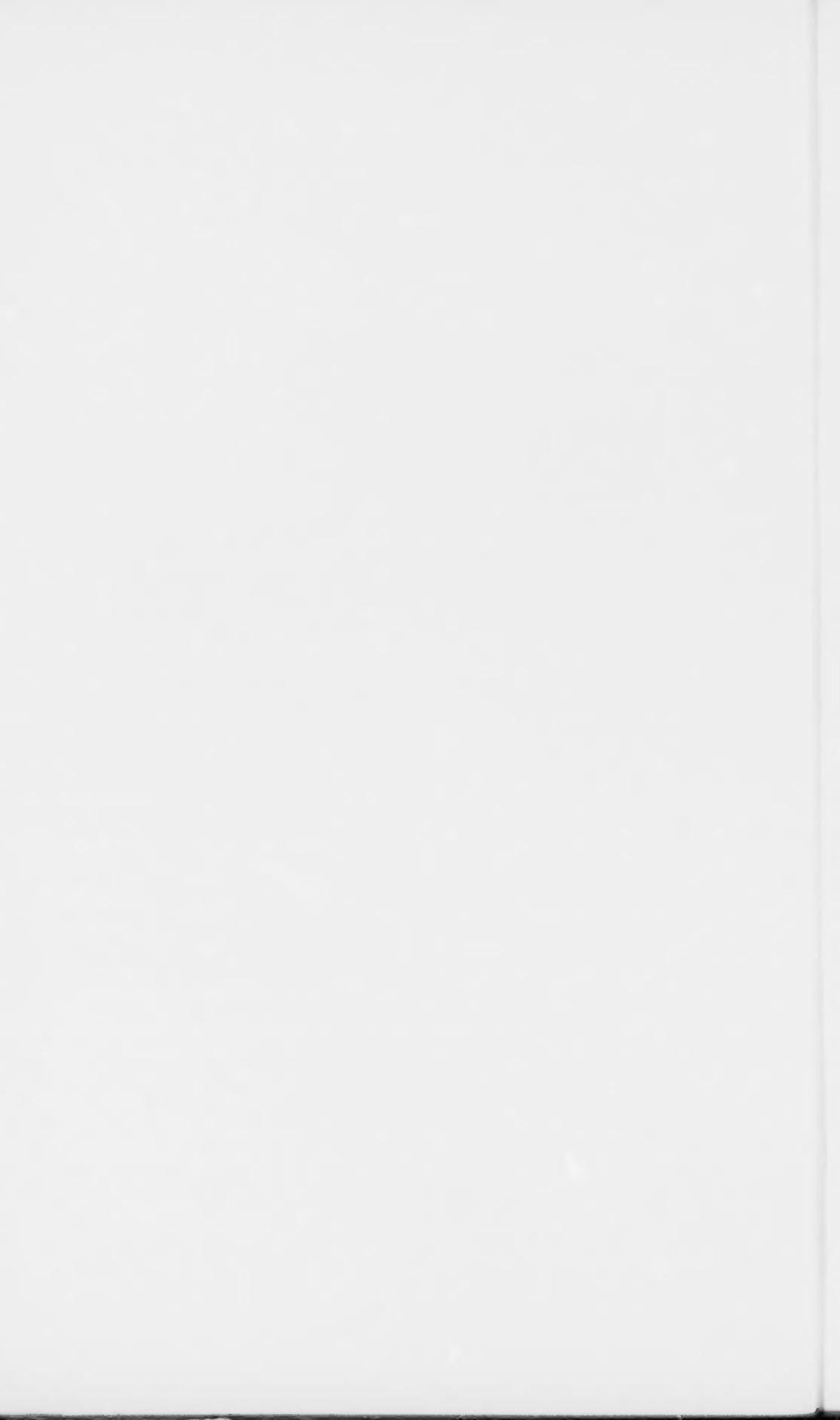
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STEWART, DENNIS R. TONEY, RICHARD
A. SMITH, W. J. MUSE,

Respondents.

QUESTION PRESENTED

Whether the Trustees' cancellation
of vested pension credits pursuant to a
provision added to the pension plan is
an amendment triggering requirements
under the Employee Retirement Income



Security Act of 1974 ("ERISA") with which the Trustees did not comply, as the Court of Appeals for the Ninth Circuit held, or whether, as the Court of Appeals for the District of Columbia Circuit held below in evaluating the same provision of the same plan, it is not an amendment.

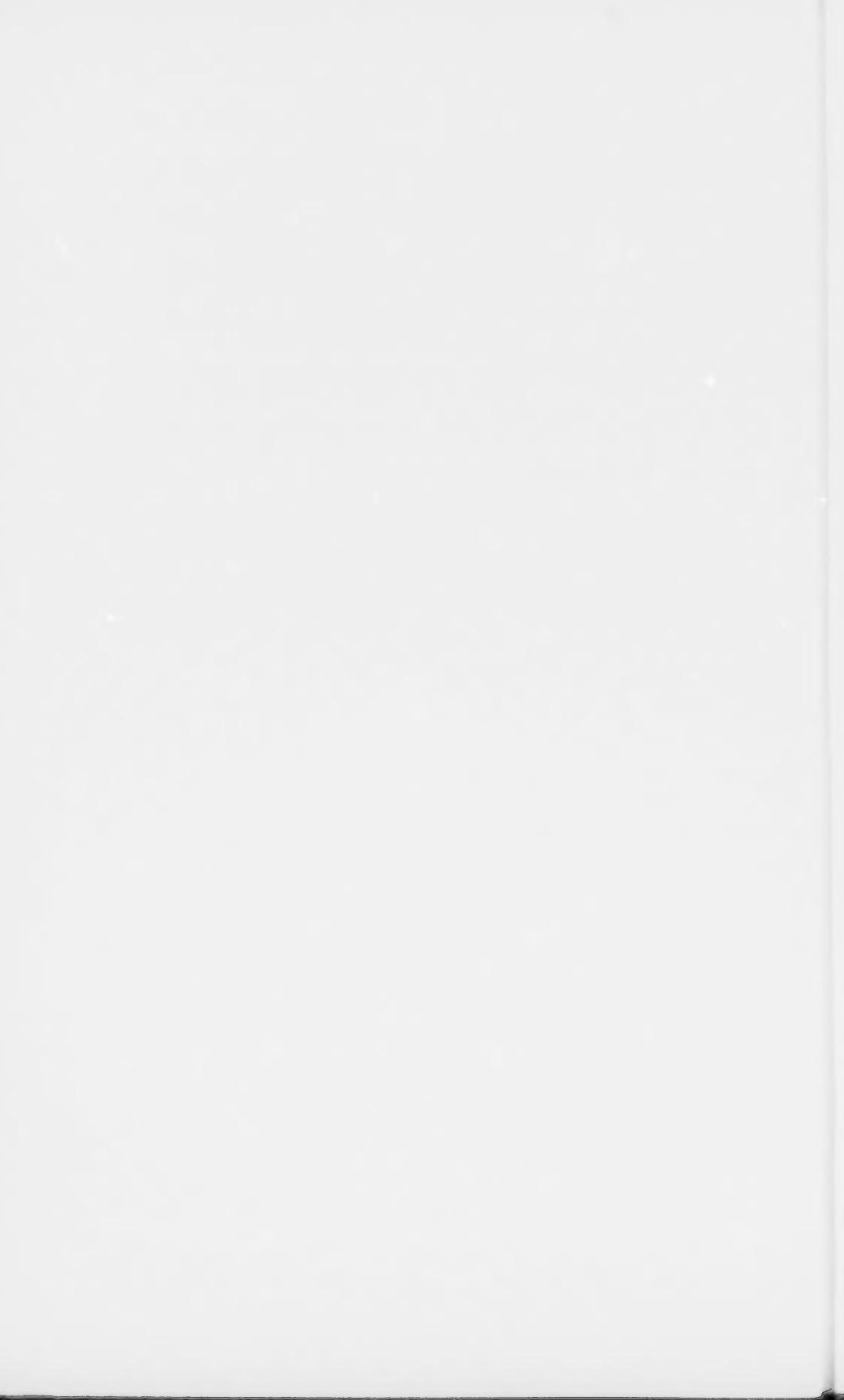


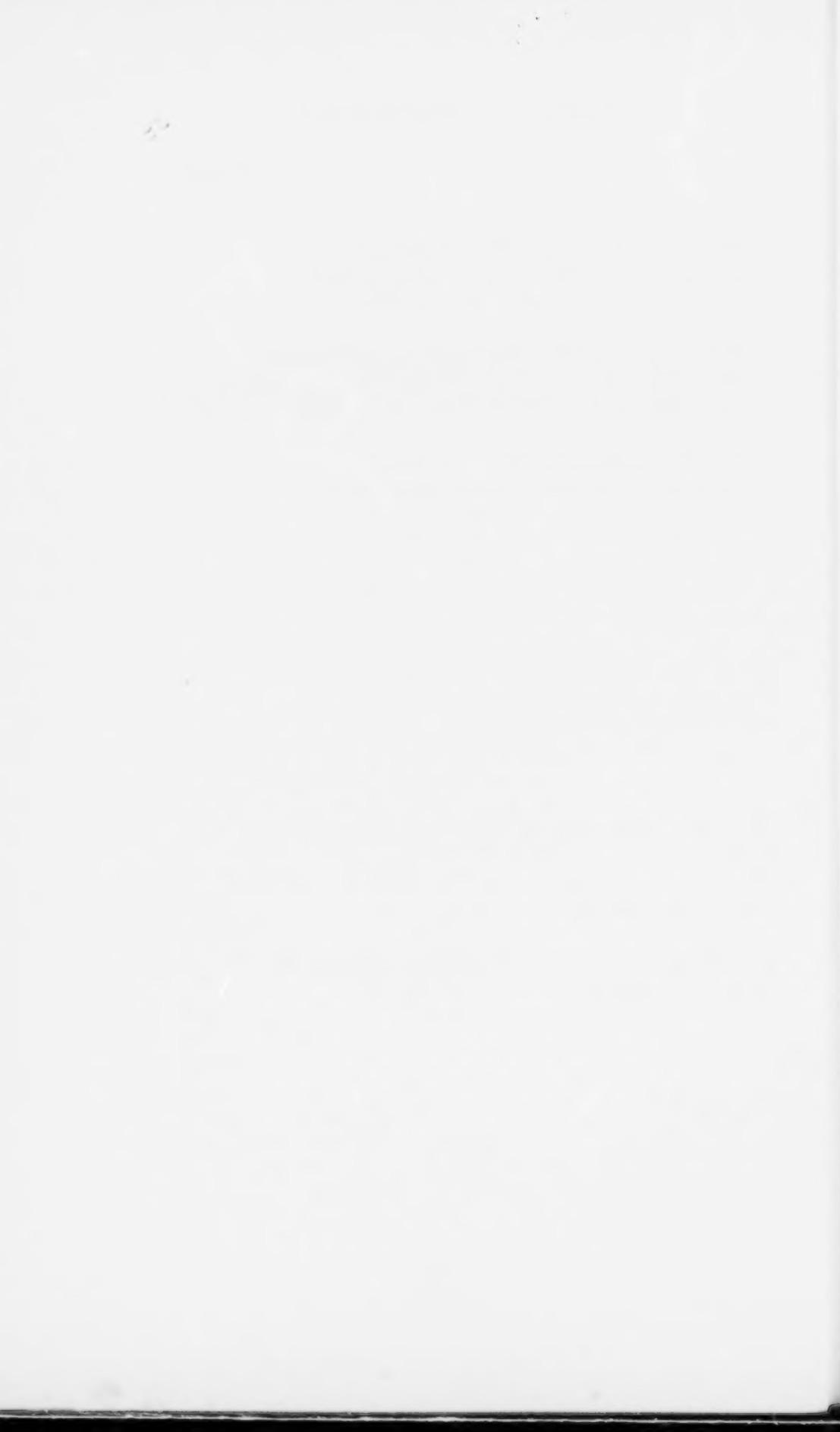
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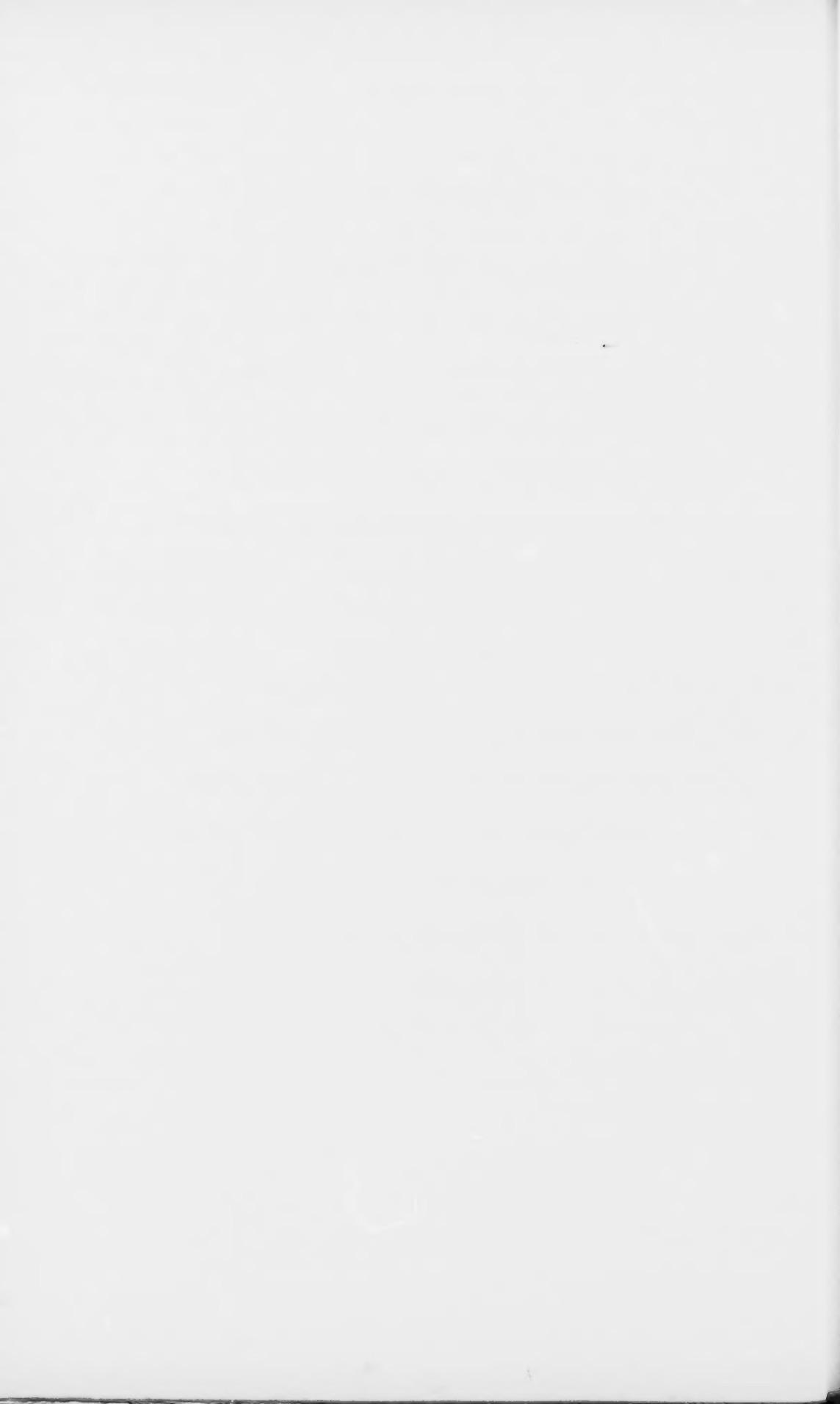


OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 730 F.2d 1552, appears as Appendix A (1a-56a). The memorandum decision and orders of the district court, reported at 563 F. Supp. 776, appear as Appendix B (57a-83a).

JURISDICTION

The decision of the Court of Appeals was filed on March 30, 1984 (App. A, 1a), and this petition is filed within ninety (90) days of that decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



STATUTES

The following statutes relevant to the consideration of this petition are set out verbatim in Appendix C (84a-88a) :

29 U.S.C. §1053(a)(3)(E)(i)

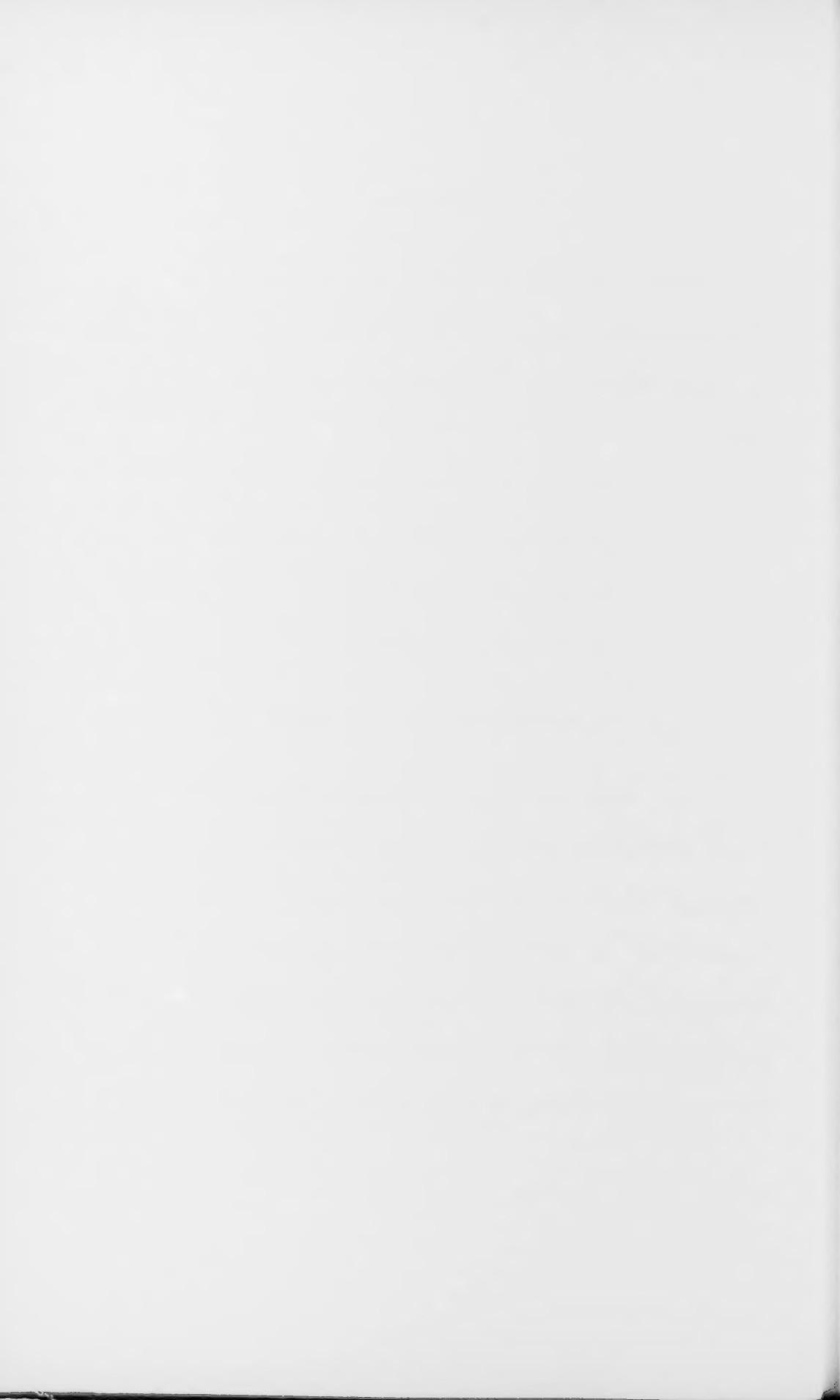
29 U.S.C. §1053(c)(1)(B)

29 U.S.C. §1054(g)

29 U.S.C. §1082(c)(8)

STATEMENT OF THE CASE

1. The National Shopmen Pension Fund ("the Fund") is a multi-employer pension fund with six trustees, three appointed by the International Association of Bridge, Structural and Ornamental Iron Workers and three appointed by participating employers. (App. A,



3a; JRE 112-113.) ^{1/} Established in 1969 under the authority of section 302(c) of the Labor Management Relations Act, 29 U.S.C. §186(c), the Fund receives contributions from participating employers pursuant to collective bargaining agreements, and pays pension benefits to these employers' retiring employees who satisfy the eligibility conditions established by the Trustees. (JRE 113-114.) There are approximately 300 employers contributing to the Fund, and about 17,800 participants. (JRE 121.)

When the Fund was first constituted, eligibility was determined, and benefits were paid out, according to the plan which went into effect in 1969. In

^{1/} "JRE" is the Joint Record Excerpts filed in the Court of Appeals.



1976, the Trustees amended the plan (JRE 114). In both versions, the rights of participants were stated to vest upon the satisfaction of certain conditions. (JRE 156-157, 193.) The summary of the 1976 Plan, see 29 U.S.C. §§1022(a)(1), 1022(b), explained this nonforfeitality requirement to participants in laymen's language: "Remember, you can't lose your earlier credit or your eligibility for a pension once you have ten full years of vesting service." (JRE 169 (emphasis in original).)

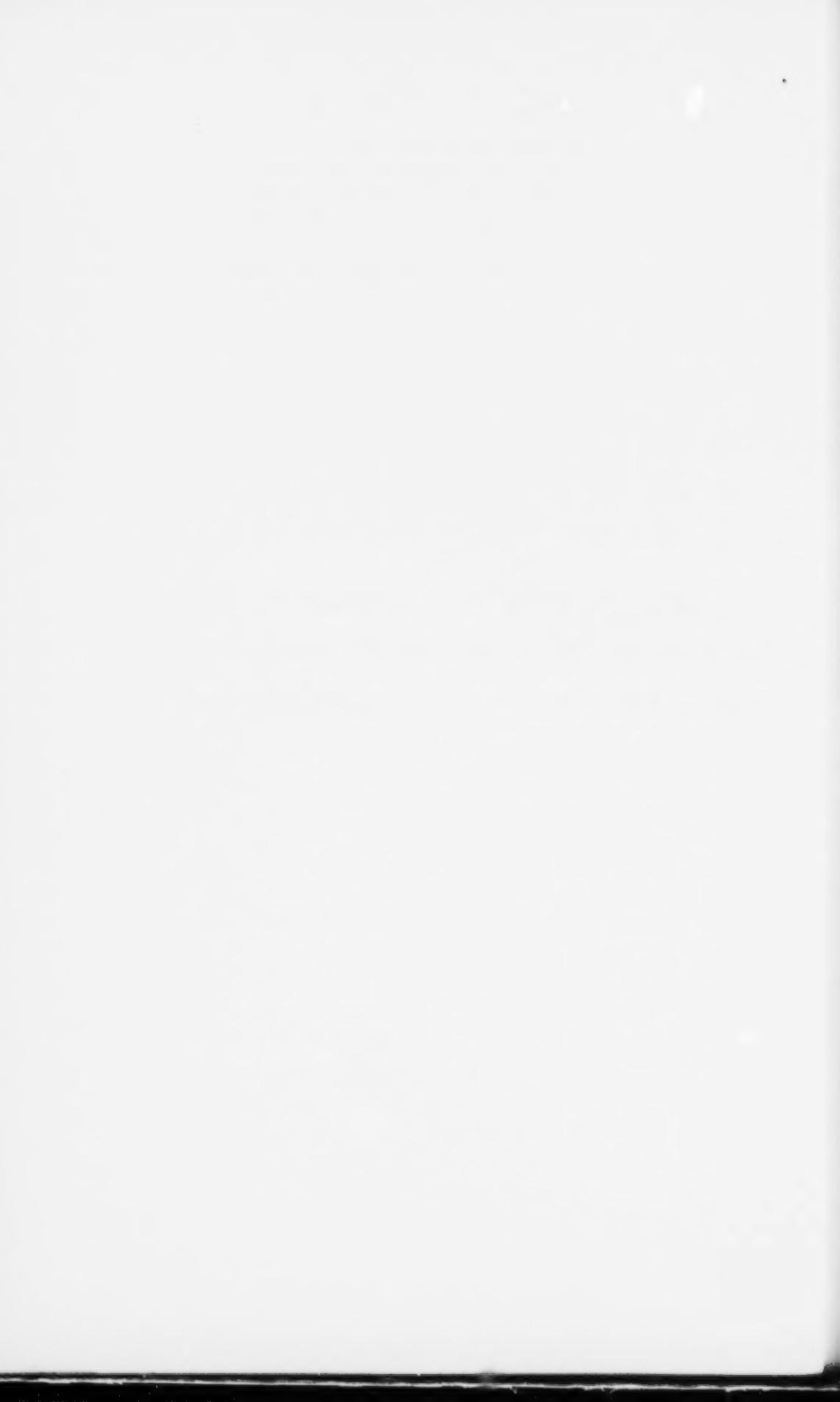
This statement of vested rights, however, did not enlighten participants as to a key amendment made in 1976, which became §2.09(a). It states:

"If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the



Trustees are empowered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, the Employers who remain as Contributiong Employers, nor the Union be obligated to make such payments." (JRE 181.)

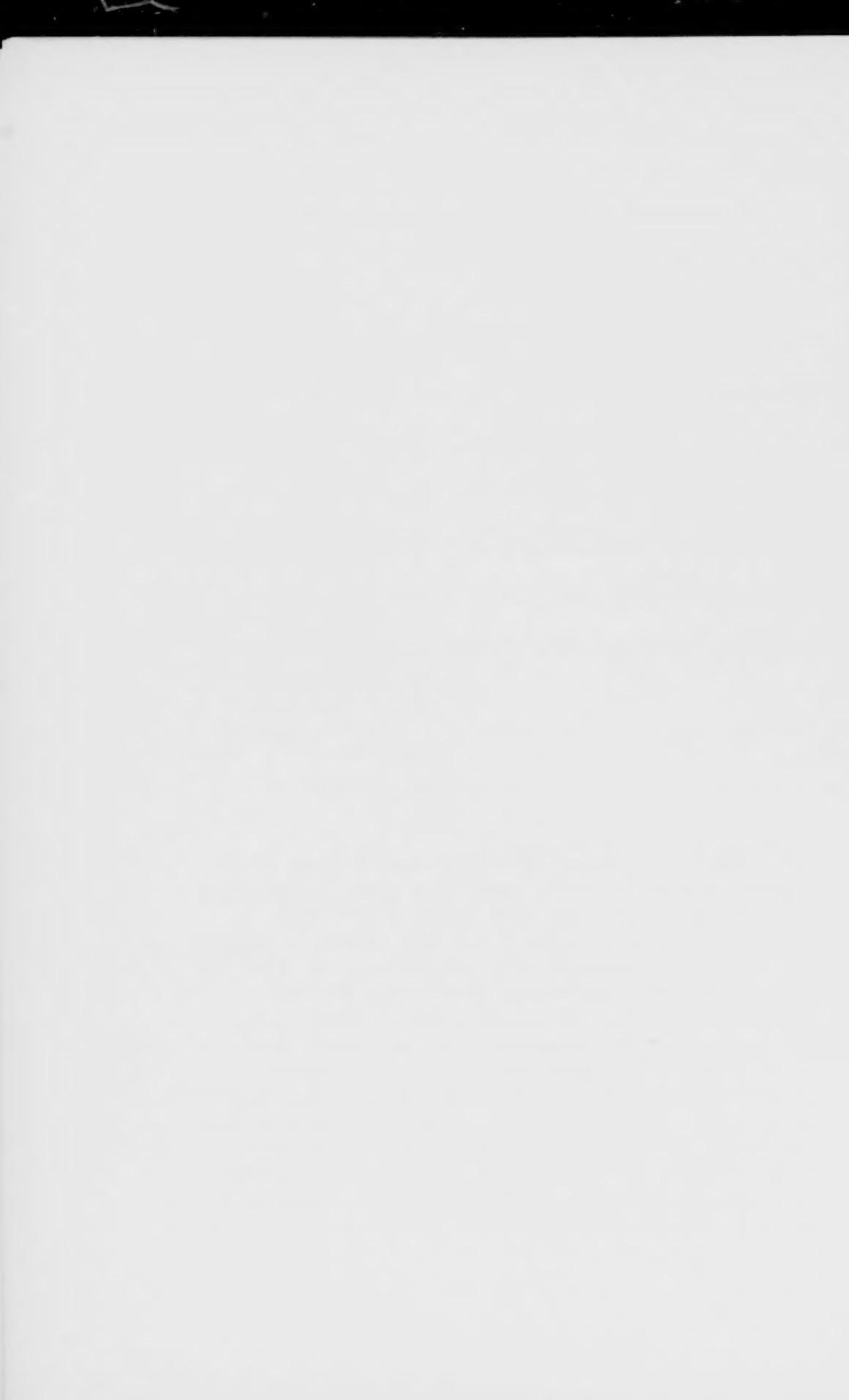
Section 2.09 thus amended the plan to give the Trustees the discretion to cancel the "past" or "precontributory"



service credits previously awarded to participants.^{2/}

2.a. Thirty-seven (37) employers ceased contributing to the Fund at different times. (JRE 381-387.) In each instance, the Fund's actuaries compared the actual liability to that employer's employees and retirees with the assets generated from the contributions of that

2/ Past service credits recognize a participant's work for the participating employer prior to the time when the employer contributed to the Fund. (App. A, 4a.) Although not required by law to provide past service credits, multi-employer plans commonly do. (See *id.*, 6a n.4.) The combination of past and "future" (or "contributory") credits provides the basis for determining eligibility for benefits. The cancellation of past service credits therefore has the effect of fully or partially divesting participants, either while they are still employed or after retirement.



employer. (JRE 379, 408-465.)^{3/} In fourteen (14) cases, the assets were greater than the liabilities; the Trustees did not invoke section 2.09 to cancel the past service credits of any participants. In the other twenty-three (23) cases, the actuaries' reports disclosed that the unfunded liabilities were greater than the assets. In each of these instances, the Trustees, following their actuaries' advice, cancelled some or all of the past service credits of employees, or of both employees and retirees. (JRE 379, 381-387.) When these cancellations resulted in a participant having less than the

^{3/} The Fund has never presented any evidence that the actuaries evaluated any or all withdrawals with respect to the effect on the fund as a whole. Each study was done solely as a comparison of the assets and liabilities attributable to the individual employer.



ten years of credit necessary for eligibility, there was a complete forfeiture; for other participants, the cancellations reduced their vested credits, but did not altogether negate their pension benefits.

Among the withdrawing employers was Fentron Industries. When the Trustees cancelled past service credits, suit was brought on behalf of all affected Fentron employees. In 1981, the district court enjoined the cancellation as violative of 29 U.S.C. §§1053(c)(1)(B) and 1054(g). Fentron Industries, Inc. v. National Shopmen Pension Fund, Nos. C79-1M, C80-68M [2 EBC 1121] (W.D.Wash., Jan. 19, 1981). The Ninth Circuit affirmed the decision on this issue. 674 F.2d 1300, 1306 (9th Cir. 1982). In September, 1982, the Trustees changed

their rules in response to Fentron so that the cancellation of past service credits would not operate to totally divest a participant of benefits. (JRE 117, 212, 387-388.)

b. On August 31, 1979, Anchor Post Products, Inc. closed its Baltimore, Maryland plant, laid off its workforce, and ceased contributing to the Fund. (JRE 116.) Acting on their actuaries' recommendation, the Trustees cancelled all the past service credits of both employees and retirees of Anchor. (App. A, 8a; JRE 116-117, 207-210.)

One of these was petitioner George Stewart, who is now 77 years old. (JRE 114, 319.) Except for service in the U.S. Navy during World War II, Mr. Stewart had worked for Anchor continuously



from 1940 to 1972. (JRE 114, 320.)

Anchor's participation in the Fund entitled him to 23 years of past service credit; with future service, his vested credits totalled 25.7 years, giving him a monthly benefit of \$80. Seven years after his retirement, however, the Trustees applied section 2.09 in response to Anchor's closing, and his pension was reduced to \$9 per month.

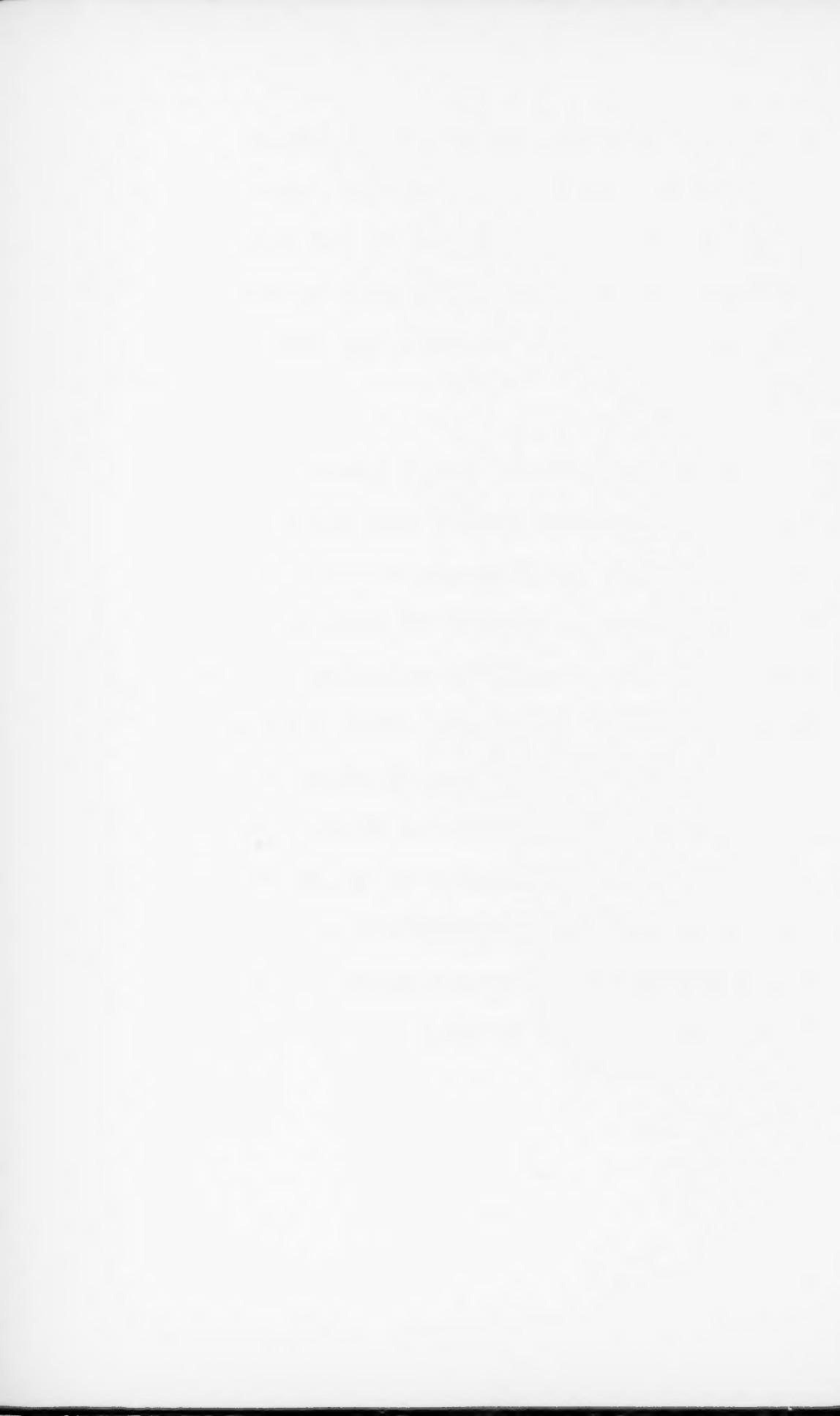
(App. A, 9a; JRE 115-118.)

Petitioner Lee Roy Warren, who is 61 years old and totally and permanently disabled, worked for Anchor from 1959 until the plant's closing in 1979. (JRE 119, 317.) At the beginning of Anchor's participation in the Fund, he was credited with 10.6 years of past service; he earned an additional 10.4 years of future service. Based on these 21 years



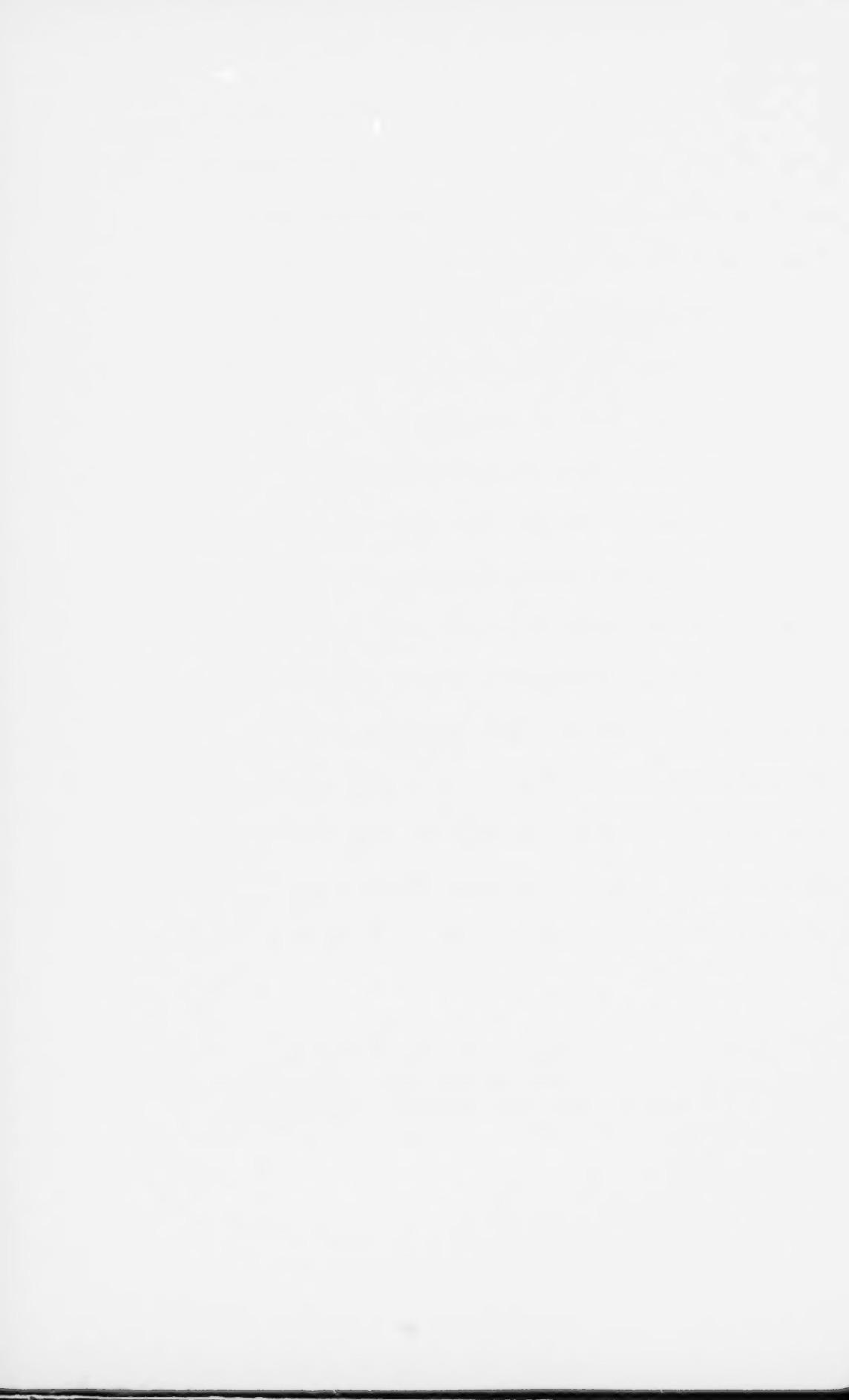
of vested credits, he would have been entitled to \$89.50 per month in benefits, but the cancellation of his past service credits produced a pension of only \$45. (App. A, 9a-10a; JRE 119-120.)

After exhausting their administrative remedies before the Trustees (JRE 119-121), petitioners Stewart and Warren, acting on behalf of themselves and all others similarly situated, filed suit on October 23, 1982. They contend- ed that the action of the Trustees vio- lated several provisions of ERISA, the fiduciary duty provisions of ERISA and the Labor Management Relations Act, and the nonforfeitability guarantee of the plan itself. (JRE 16-19.)



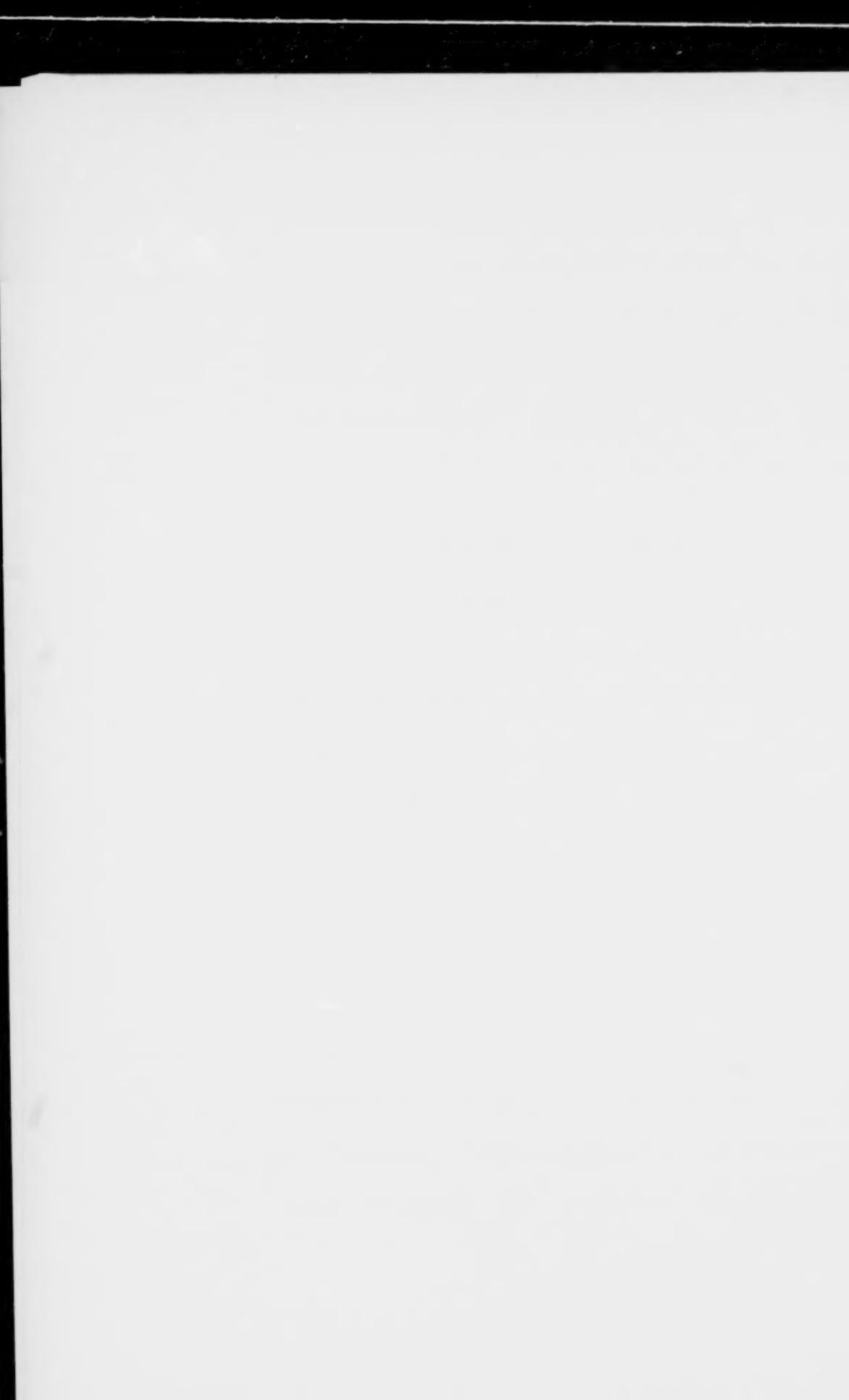
3.a. On May 20, 1983, after oral argument, the district court certified a nationwide class of all employees and retirees whose credits had been canceled (excluding the Fentron class members). (App. B, 78a-83a.)^{4/} The Court granted plaintiffs' motion for summary judgment, and denied defendants'. In his memorandum decision, the district judge concluded that Fentron should not control this case through the principle of collateral estoppel (App. B, 65a-66a n.5), but he held that Fentron was persuasive authority in recognizing that the Trustees' action was an amendment to the plan. (Id., 65a-66a, 70a.) Accordingly, as there was no dispute

^{4/} The Court of Appeals below incorrectly described the class as consisting only of "employees and former employees of Anchor" (App. A, 2a).



that the Trustees had not satisfied the terms of 29 U.S.C. §§1053(c)(1) (B), 1054(g), and 1082(c)(8) (JRE 121-122), he found that they were in violation of these ERISA provisions. (App. B, 67a-68a, 70a).

b. On appeal by the Trustees, a panel of the Court of Appeals agreed that collateral estoppel was not applicable in this situation. (App. A, 10a-18a.) The Court distinguished Fentron on the grounds that it had involved a complete divestiture, whereas, in this instance, "the Fund has not attempted to divest the plaintiffs completely of their right to a pension." (Id., 15a (emphasis in original; footnote omitted).) While recognizing that "[t]here is language in Fentron which arguably is broad enough to cover the issue in this



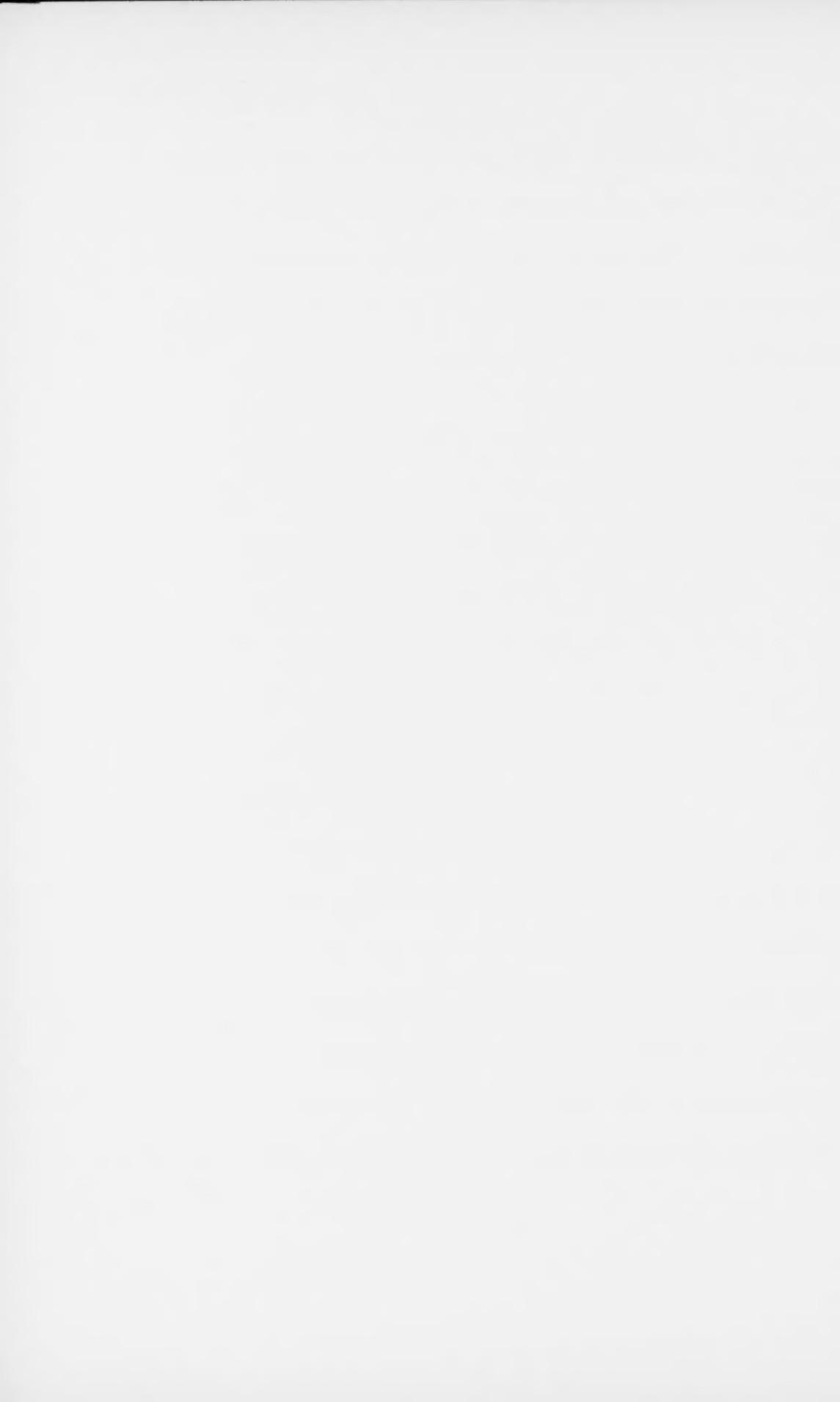
case" (*id.*, 16a (footnote omitted)) and that "[s]ome of the language in Fentron might be construed to imply that cancellation of credits resulting in reduced benefits are forfeitures prohibited by ERISA" (*id.*, 39a n.24), the Court observed that the application of section 2.09 to effect a complete divestiture was an amendment to the vesting schedule, but its application to accomplish a partial divestiture was not an amendment. (*Id.*, 40a n.24.)

In its analysis of the statutory scheme (App. A, 19a-53a), the Court examined the applicability of 29 U.S.C. §1053(c)(1)(B) and of §§1054(g) and 1082(c)(8). Both require plan trustees to take specific actions when they amend the plan; the Trustees admittedly took neither action in this case, so that, if



either provision were applicable, the cancellation of vested rights would be illegal. The Court's decision therefore hinged on whether there had been an amendment.

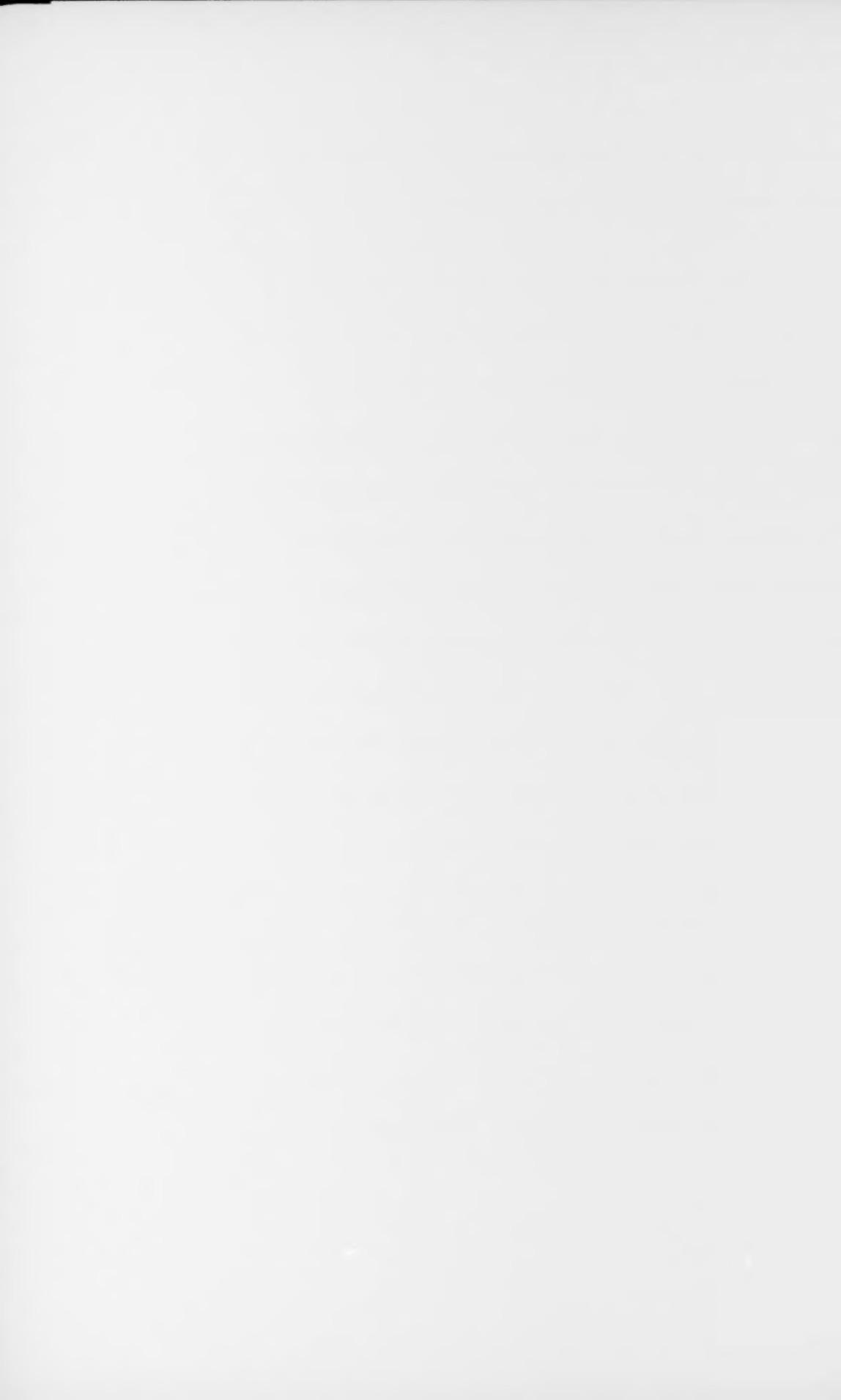
The Court rejected any notion that section 2.09, alone or in conjunction with later Trustee action, was an amendment, despite the fact that it was a 1976 addition to the plan. (App. A, 20a (calling section 2.09 a "pre-existing plan provision") and 33a (terming it "a provision already incorporated into the plan").) It then concluded that the exercise of the Trustees' discretion under section 2.09 could not be an amendment because, "[u]nder [plaintiffs'] construction, reducing any benefits, authorized by the plan, of persons whose rights are vested, would



constitute an 'amendment.'" (App. A, 33a (emphasis in original).)

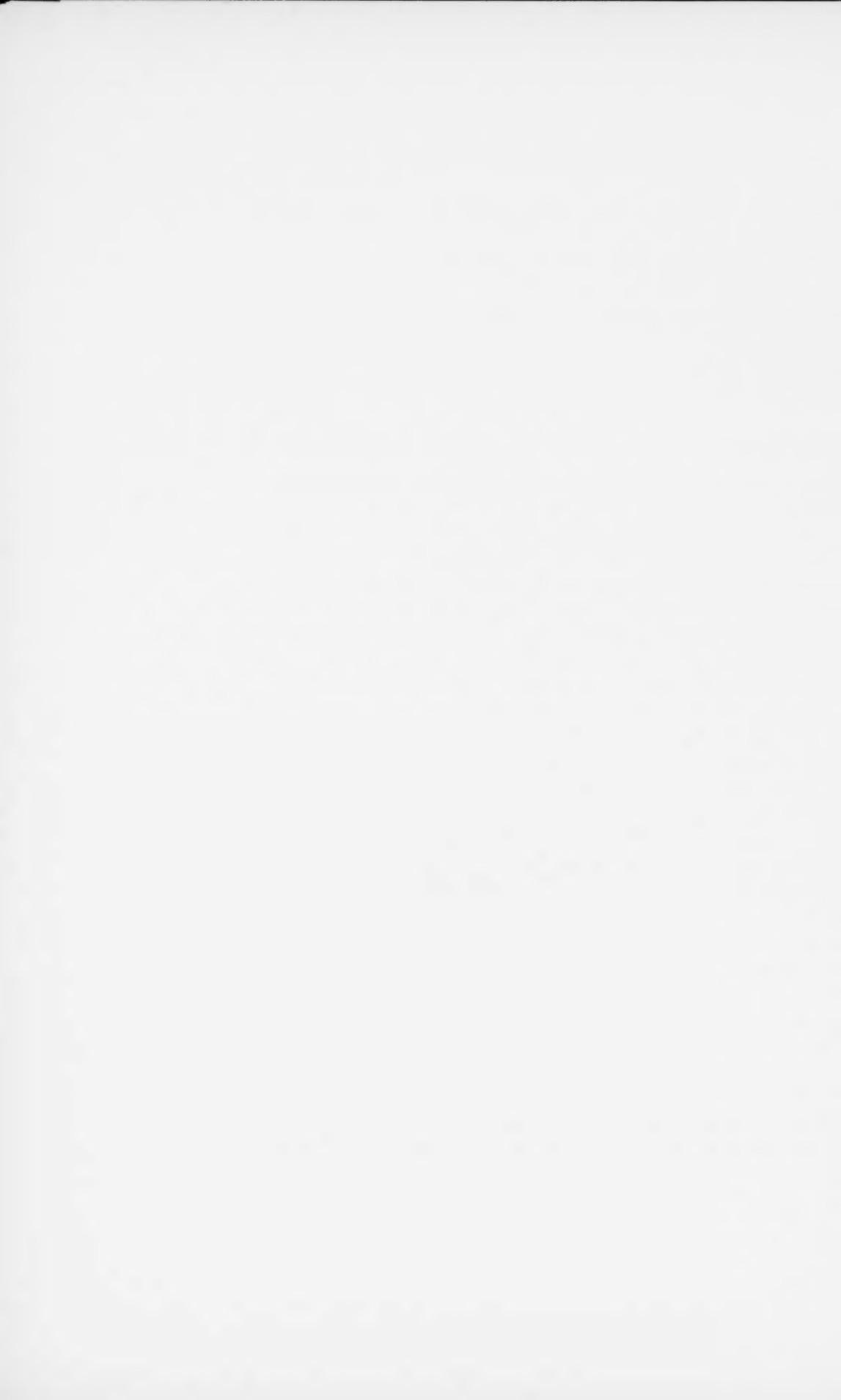
The Court went on to distinguish between vesting schedule amendments and amendments affecting the accrual of benefits. This was not the former, the Court held, because the trustees' action "changes only the amount of benefits a pensioner receives, not his vested status." (Id., 39a (emphasis in original).) It was not the latter, according to the Court, because the Trustees were merely "implementing preexisting plan provisions." (Id., 43a).

The Court relied on several other cases involving the cancellation of past service credits upon the withdrawal of participating employers. (Id., 47a-50a.) It observed that the courts in



these cases did not discuss 29 U.S.C. §§1053 (c)(1)(B) and 1054(g), and apparently inferred that those courts had found those sections inapplicable to situations of this type.⁵/

5/ The Court below devoted special attention to Elser v. I.A.M. National Pension Fund, 684 F.2d 648 (9th Cir. 1982), cert. denied 104 S.Ct. 67 (1983), issued shortly after Fentron. Not only was Elser consistent with its position, the Court said (App. A, 50a n.29), but it suggested that the "Fentron decision was plainly repudiated by the same court [in Elser] only months later." (*Id.*, 20a n.10.) This inference is based on an inaccurate understanding of Elser, however, for, in that case, no allegations were ever made or considered regarding the applicability of 29 U.S.C. §§1053(c)(1)(B) and 1054(g). See Complaint in Elser v. I.A.M. National Pension Fund, No. 78-2538DWW (C.D.Cal., filed June 30, 1978); Brief for the United States as Amicus Curiae in Support of Respondents (urging that petition for certiorari be denied) in I.A.M. National Pension Fund v. Elser, No. 82-1325 (filed Aug. 15, 1983), at 3-4; see also *id.*, at 8 n.9 (discussing difference between Elser and Fentron). The Ninth Circuit Elser panel simply did not analyze the issues raised in this case.



The case was remanded to the district court for resolution of the remaining issue: Was the Trustees' action arbitrary and capricious? The district judge was instructed to "evaluate the evidence to determine whether there was a reasonable actuarial basis for the action of the trustees." (App. A, 55a (footnote omitted).)

The mandate issued on April 30, 1984, and plaintiffs filed a request with the district judge on May 1, 1984 that he rule on the remaining issue. That issue is pending.

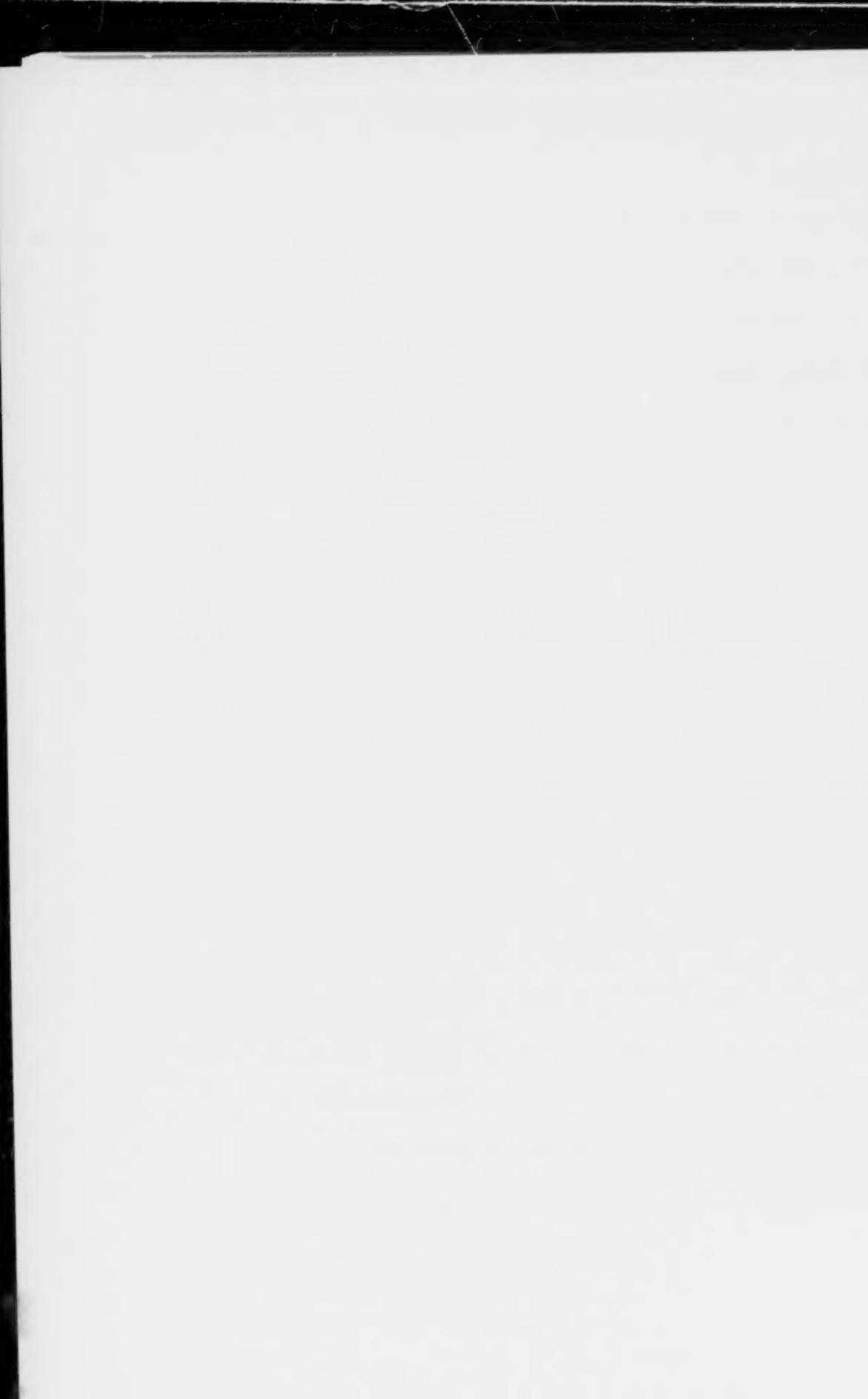
REASONS FOR GRANTING THE WRIT

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PROTECT VESTED RIGHTS

The importance which Congress
assigns to the private pension system,
and the consequent need to protect the
intended beneficiaries of that system,
are declared in the opening provision of
ERISA. 29 U.S.C. §1001. The legis-
lative history of ERISA also repeatedly
asserts the legislature's intent to
protect the vested rights and expecta-
tions of participants. See, e.g.,
H. Rep. No. 93-533, 93d Cong., 1st Sess.
(1973), reprinted in [1974] U.S. Code

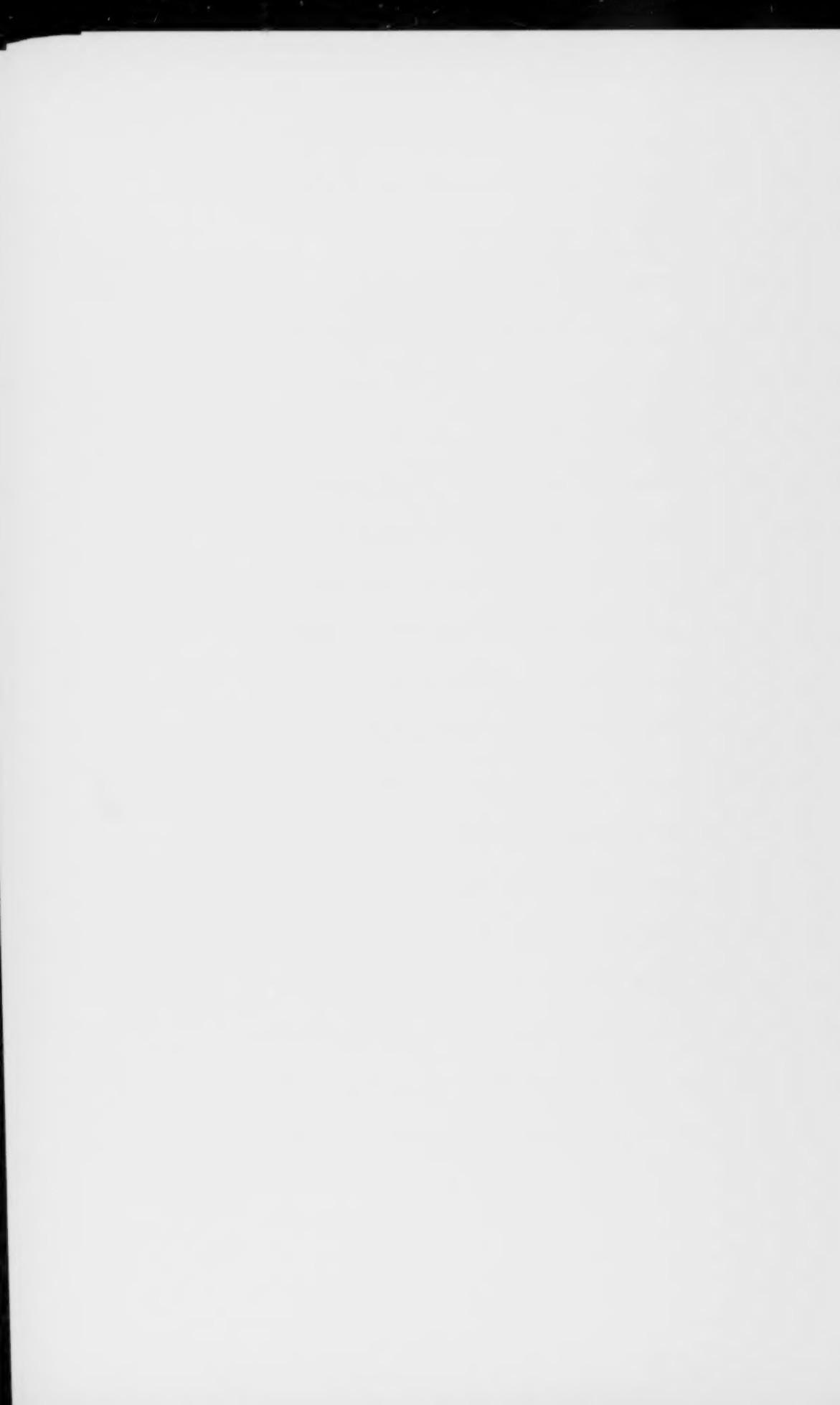
Cong. & Admin. News 4639-4646; S. Rep. No. 93-383, 93d Cong., 1st Sess. (1973), reprinted in [1974] U.S. Code Cong. & Admin. News 4890. And, this Court has expressly observed the concerns which motivated Congress, recognizing that ERISA is a "comprehensive and reticulated statute." Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361-362 (1980).

This backdrop emphasizes the significance of the decision below, which validates a bifurcated effort by plan trustees to repudiate vested rights. In the face of specific and detailed statutory provisions, the Trustees have unilaterally acted to cancel rights which their own summary plan description has described to participants as inviolable. The Court



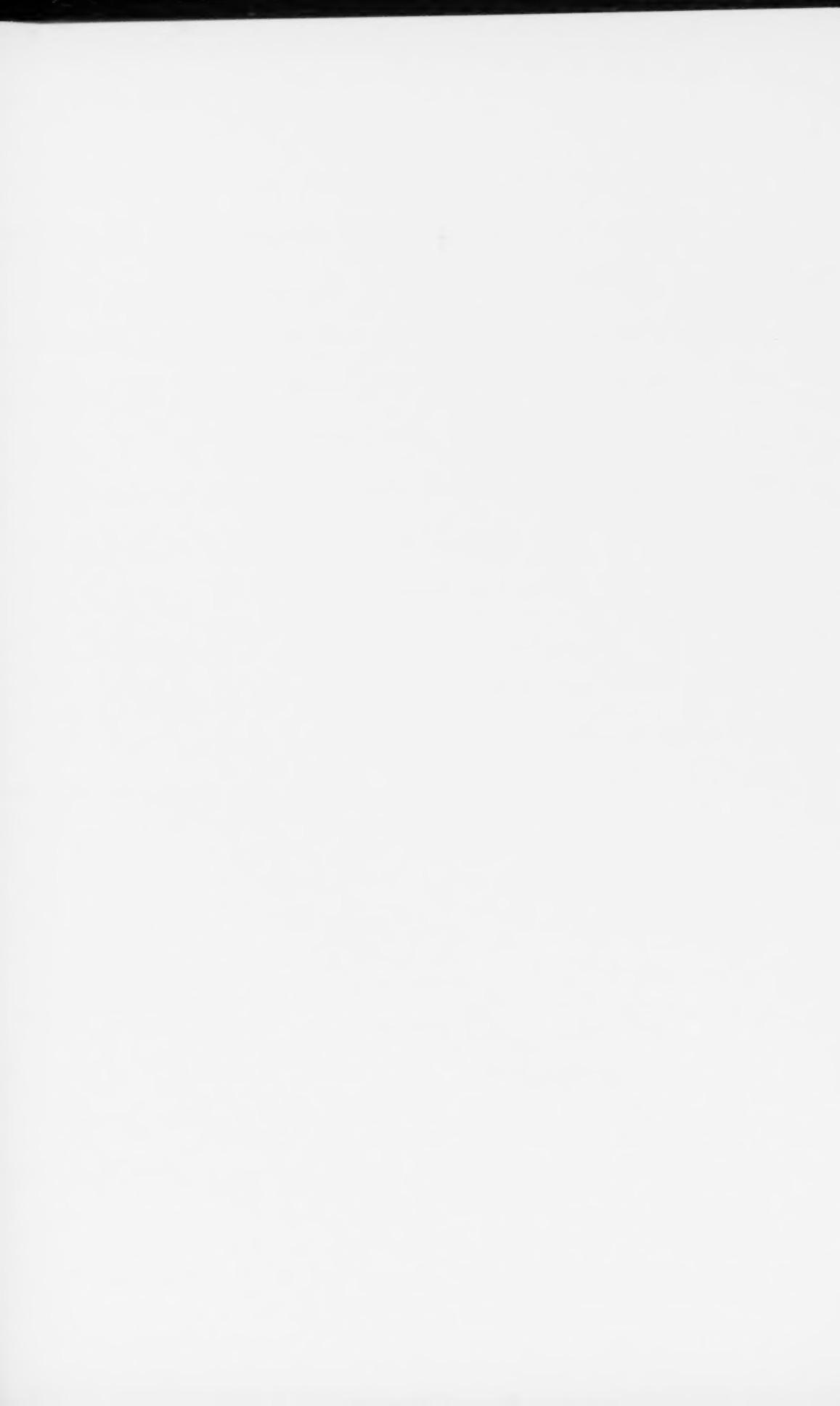
below has upheld this action by an unrealistic reading of a key word in the relevant provisions -- "amendment" -- and, in doing so, has directly contradicted the determination of another appellate court. Moreover, if not reversed, the decision below will open a major loophole in ERISA's protections, for it will allow trustees in numerous situations to effect significant amendments to their plans without subjecting them to the limitations included in ERISA expressly to prevent such harmful and unnecessary amendments.

1. ERISA demands that trustees, when they change rules by amendment, take certain actions intended to balance the "often conflicting" dual obligations of trustees "to preserve the financial security of a pension fund and to apply



the assets of the fund for the benefit of the employees to the greatest extent possible." Adams v. New Jersey Brewery Employees' Pension Trust Fund, 670 F.2d 387, 397 (3d Cir. 1982) (footnote omitted), quoted in Stewart v. National Shopmen Pension Fund, *supra* (App. A, 42a). The action of changing a rule is of equal import with the substance of the rule.

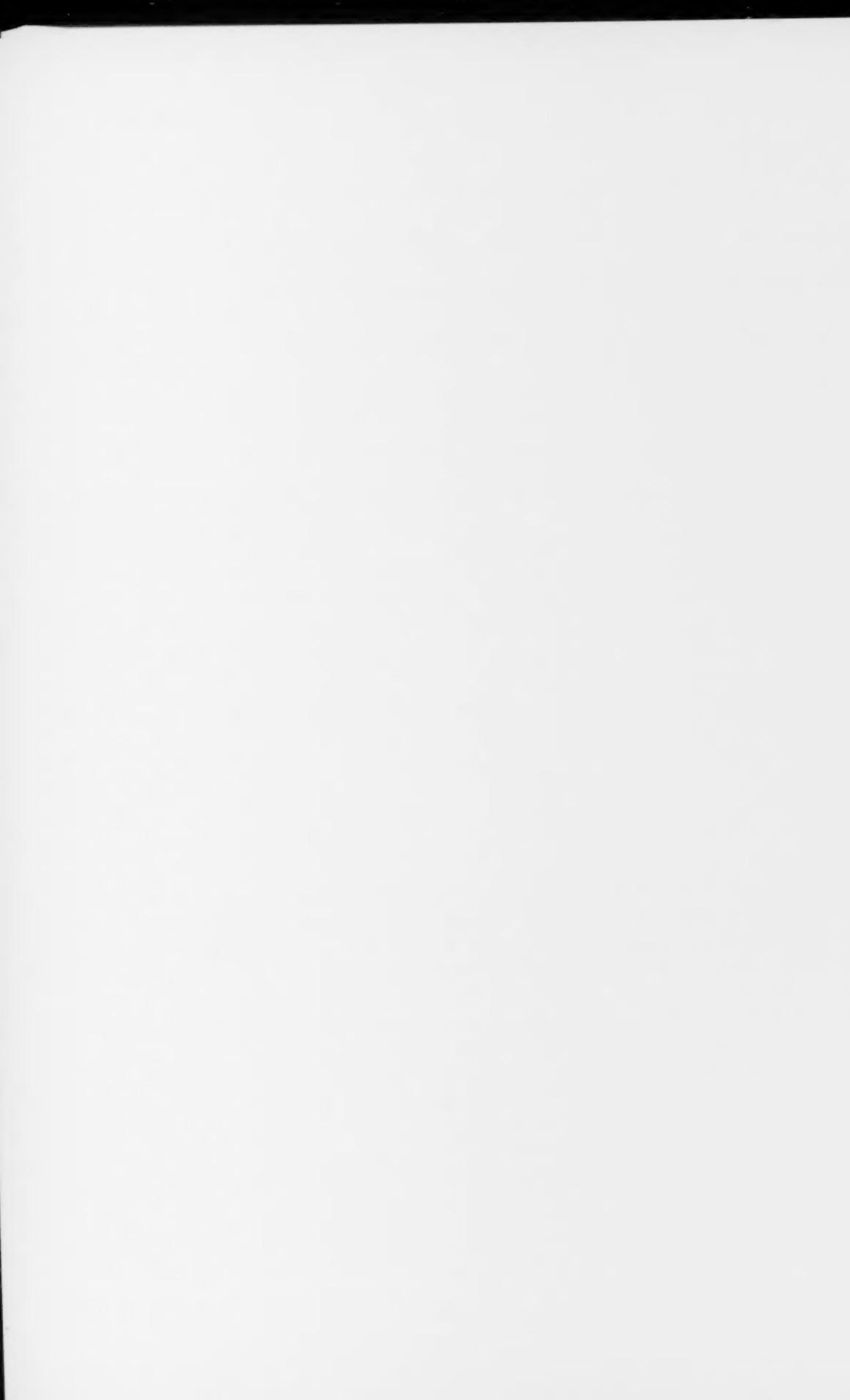
ERISA does not require plans to provide past service credit in its vesting provisions. 29 U.S.C. §1053(b)



(1)(C).⁶/ Similarly, ERISA views the negation of past service credits upon an employer's withdrawal as an exception to the nonforfeitality requirement. 29 U.S.C. §1053(a)(3)(E).

That a proposed rule may satisfy an exception to the nonforfeitality requirement, however, does not automatically validate it. It must comport with

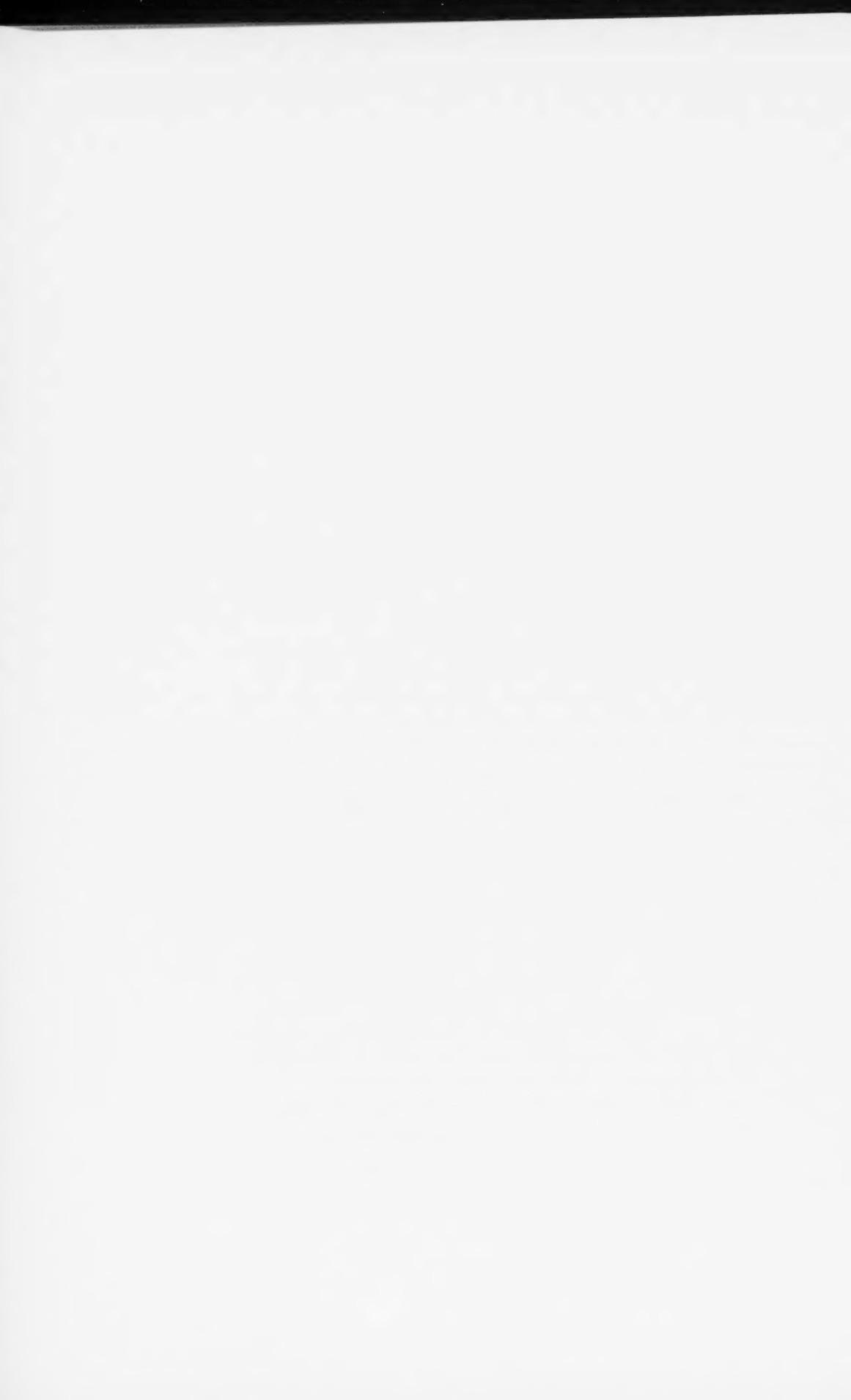
⁶/ There are compelling reasons, however, for collectively bargained plans to recognize past service; because unions must bargain for plans acceptable to a majority of their members, including older workers, there are institutional incentives for union negotiators to demand and obtain recognition of past service. Accordingly, plans often include past service, amortizing the liability for these unfunded credits through the future contribution rate. See App. A, 6a-7a n.4.



other aspects of ERISA as well.⁷ These provisions spell out in detail the steps which trustees must take when they seek to amend rules to negate vested rights, and follow historically from the common law protections which this Court has recognized.⁸ Thus, the vesting

⁷/ In his amicus curiae brief opposing the granting of certiorari in Elser, the Solicitor General noted these two points, that ERISA does not require past service credits and permits them to be cancelled. "But these provisions do not create an absolute 'safe harbor'; the trustees' actions still must satisfy the trustees' overriding fiduciary obligations imposed by Section 404(a) of the Act." At 16-17. Similarly, trustees must also comply with the specific amendment requirements, which were not mentioned in Elser because they were not at issue.

⁸/ "'Under established contract principles, vested retirement rights may not be altered without the pensioner's consent.' ... The retiree, moreover, would have a federal remedy under §301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed." United Mine Workers of America Health and Retirement Funds v. Robinson, 102 S.Ct. 1226, 1234 n.14 (1982) (citations omitted).



requirements are not satisfied when the vesting schedule is amended

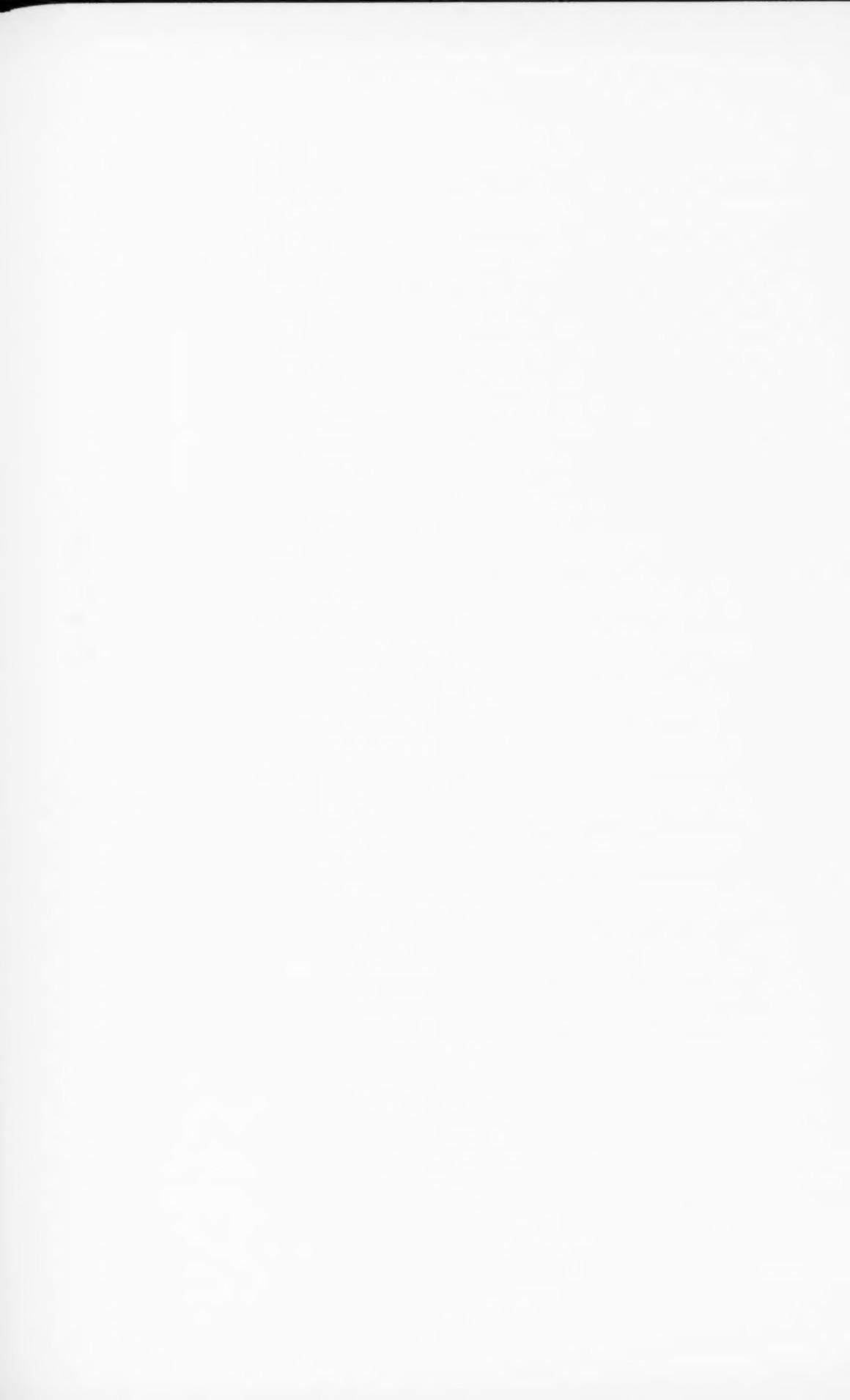
"unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment." 29 U.S.C. §1053(c)(1)(B).

That is, when an amendment is sought to the vesting schedule, the trustees must provide participants with the opportunity to continue under the old rule.^{9/}

Likewise, section 204 of ERISA (29 U.S.C. §1054), the accrual rule, subjects trustees to specific demands:

"The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in

^{9/} Future participants, and present ones not covered by 29 U.S.C. §1053(c)(1)(B), must accept the new vesting schedule. The trustees thus can always make prospective changes.



section 1082(c)(8) of this title." 29 U.S.C. §1054(g).

That subsection states, in applicable part:

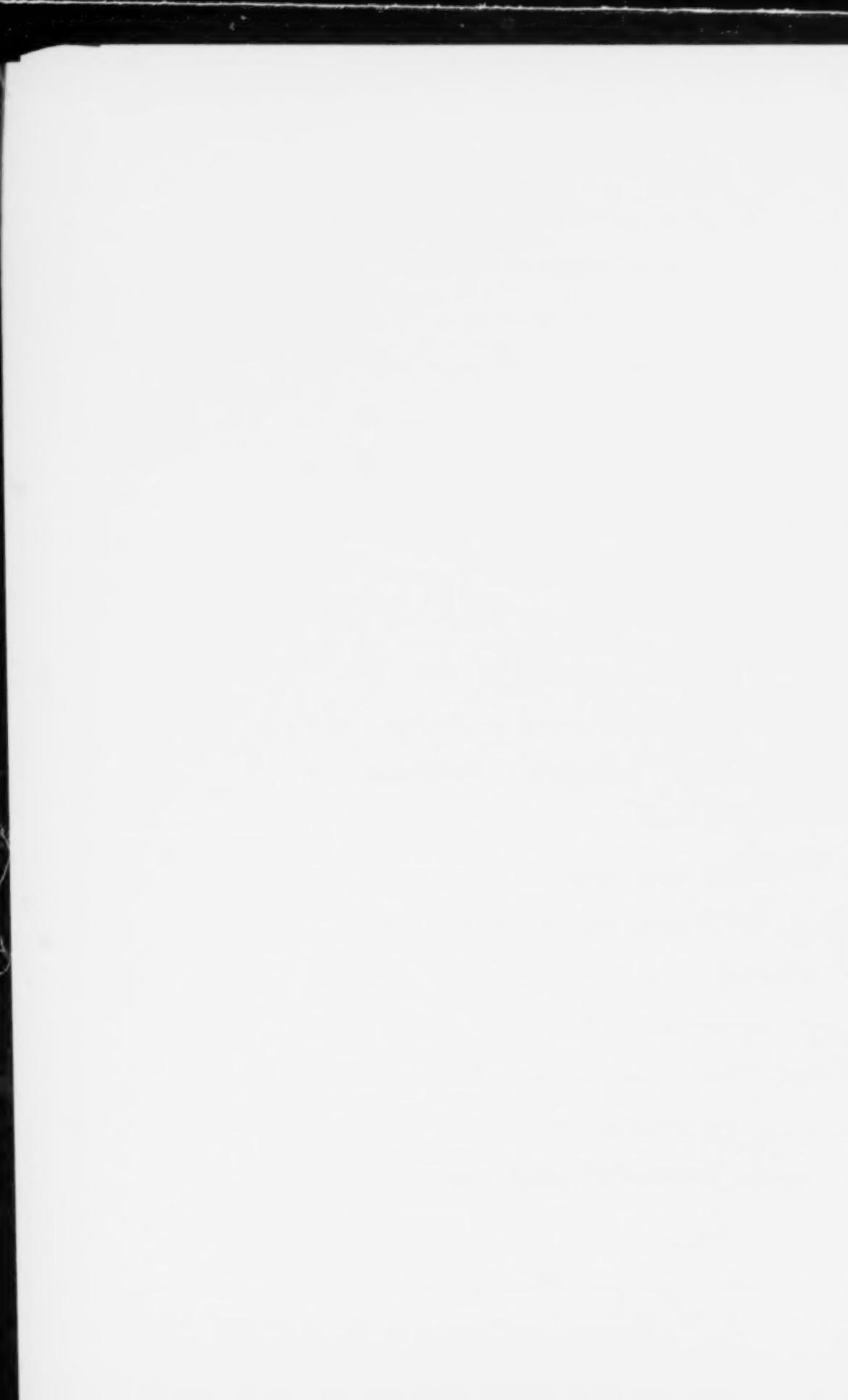
"No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary [of Labor] notifying him of such amendment and the Secretary has approved such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship ... and that waiver ... is unavailable or inadequate." 29 U.S.C. §1082(c)(8).^{10/}

Under this scheme, trustees are subject to careful scrutiny by the Secretary of Labor when they attempt to

10/ The minimum factors which the Secretary must consider in determining "substantial business hardship" are set out in 29 U.S.C. §1083(b). Those factors require the Secretary to focus his attention on economic matters relevant to the continued viability of the plan.

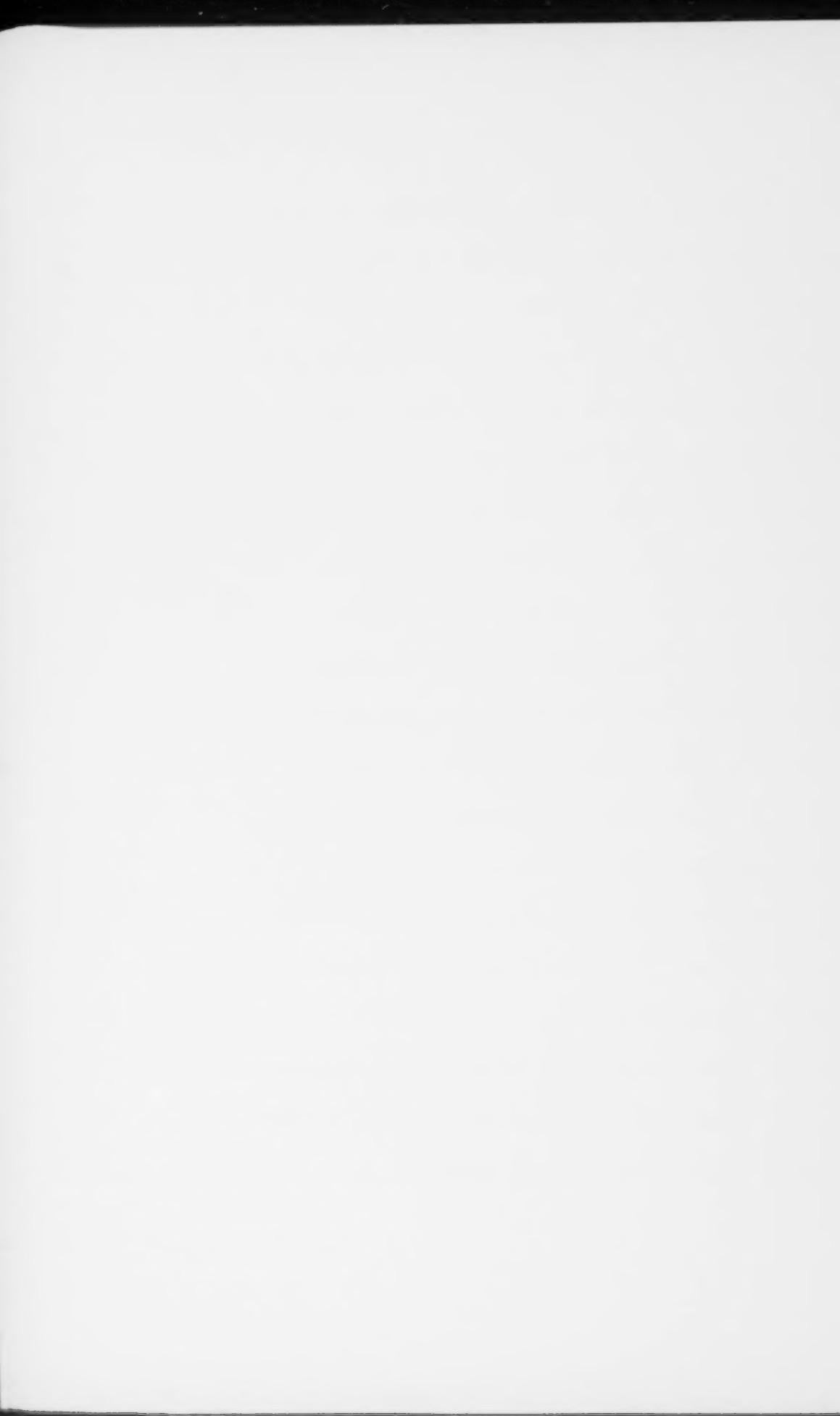
amend the plan to reduce the accrued benefits of participants, and the Secretary is obligated to evaluate whether there exist financial reasons sufficiently compelling for the trustees to take the extraordinary step of decreasing benefit payments. The procedure recognizes that once participants have been promised a certain level of benefits, an impartial arbiter (the Secretary) must be convinced that the plan's very survival requires a reduction in plan liabilities.

The obligations of trustees under these provisions are only triggered by an amendment to the plan. As the Court below recognized, the issue here is thus whether there was an amendment. The Court's conclusion that there was no amendment directly conflicts with that



of the Ninth Circuit in Fentron, as well as with the district judge in Fentron, and, of course, the district judge in this case. Thus, the other three courts which have considered the exact action evaluated by the Court of Appeals in this case -- the same plan, the same plan provision, and the same response by the Trustees -- have concluded that there was an amendment. See Fentron Industries, Inc. v. National Shopmen Pension Fund, supra, 2 EBC, at 1122; Stewart v. National Shopmen Pension Fund, supra (App. B, 66a, 70a).

In the Ninth Circuit, Judge Anderson, writing for the unanimous panel, rejected the Trustees' argument, the same one made in this case and accepted by the Court of Appeals below, that the cancellation was not an amendment:



"The trustees' decision to use section 2.09 changed class members' vested benefit rights. Before the cancellation of Past Service Credits, the benefits of all members of the class were vested under the 1969 Plan. The effect of cancelling Past Service Credits was to diminish the pension credits of all members, each of whom at that time had to have Past Service Credits to qualify for pension vesting under the 1969 Plan. The cancellation thus divested previously vested employees, who then would only be eligible for vesting in the future, if at all. The trustees' use of section 2.09 was therefore a vesting schedule amendment

"It is of no consequence, in this regard, that the trustees' cancellation does not directly change the 1969 Plan vesting schedule. Admittedly, the 1976 Amendments did not, by themselves, change the portion of the Plan that relates to the credits necessary for vesting. However, the trustees' action under section 2.09 did change class members' vested rights. The Fund and its trustees cannot be permitted to do indirectly what



would be prohibited if done directly by changing the vesting schedule without changing the vesting provisions of the plan." 674 F.2d, at 1306 (footnote omitted; emphasis in original).^{11/}

This analysis reflects the reality of the Trustees' combined actions.

Prior to 1976, there was no authority in the plan for the cancellation of past service credits. The plan was amended to empower the Trustees with that authority, and they acted on it later. At some point, there was an amendment to the plan affecting either the vesting schedule or accrued benefits. It is of

^{11/} As was noted by the district court in this case, this analysis is equally applicable to the question of whether there was an amendment reducing accrued benefits. App. B, 70a. It is therefore of no consequence whether the Trustees' action is viewed as affecting the vesting schedule or accrued benefits; it affects at least one, and, if it is an amendment, the Trustees have statutory obligations in either situation.



no moment that the Trustees did not negate these rights in one action, for the effect of their combined actions was an amendment to the plan.

The Court of Appeals below depicts this commonsense view of the totality of the Trustees' action as "stretch[ing] the term 'amendment' nearly to the breaking point." (App. A, 33a.) The panel contends that plaintiffs were trying to read the crucial word "amendment" out of the provisions (*id.*, 41a), but that is inaccurate. There was an amendment to the plan, in 1976; as a result of acting on that amendment, the



Trustees were able to alter the vesting schedule and reduce accrued benefits.^{12/}

In rejecting plaintiffs' contention that there was an amendment decreasing accrued benefits, the Court of Appeals viewed plaintiffs as arguing "that any reduction in benefits should be considered a plan amendment" (App. A, 41a), and stated that 29 U.S.C. §1054(g)

12/ The Court of Appeals specifically rejected the district court's conclusion that there was any effect on the vesting schedule. (App. A, 36a-40a.) As noted, supra, at 30 n.11, that issue is not determinative of the outcome of this case, since, at a minimum, there was an amendment decreasing accrued benefits. Petitioners would note, however, the reasons advanced by the Ninth Circuit, 674 F.2d, at 1306, and the district judge in this case (App. B, 63a-68a), to explain why it was a vesting schedule amendment. Further, it is also significant that the provision which permits trustees to cancel past service credits, 29 U.S.C. §1053(a)(3)(E), is part of section 203 of ERISA (29 U.S.C. §1053), the vesting and nonforfeitability provision, not section 204 (29 U.S.C. §1054), which involves accrual.



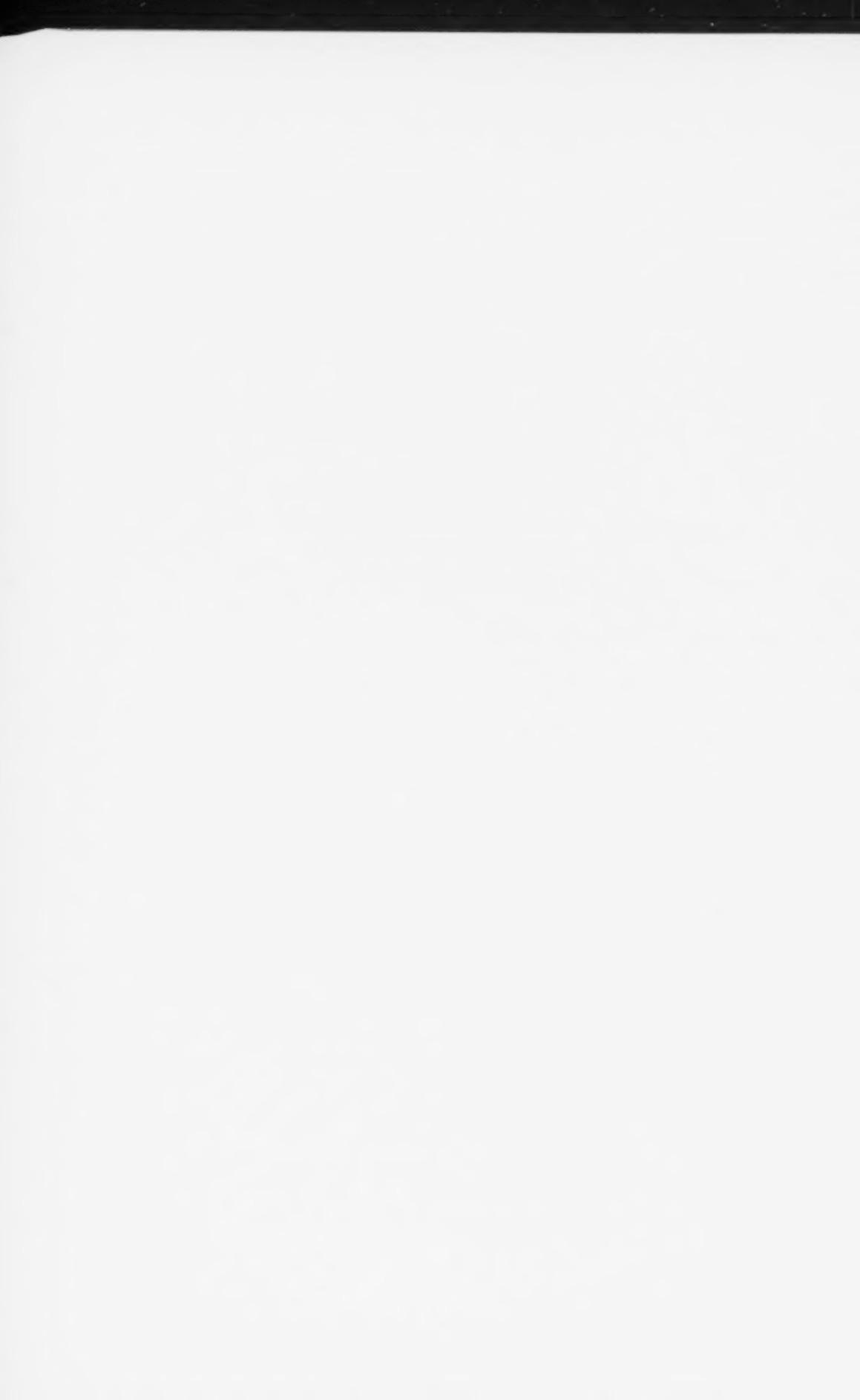
"is specifically limited to actual amendments, not otherwise approved by ERISA, which would change benefit amounts." (*Id.*, 43a (emphasis in original).) The Court's characterization of plaintiffs' argument is wrong, however; plaintiffs have simply argued that there was an amendment, and that it resulted in a decrease in accrued benefits. It was an "actual amendment." The distinction between an amendment which itself reduces accrued benefits, and one which empowers trustees to reduce accrued benefits, is meaningless. That the end result was accomplished in two steps rather than one does not alter the simple fact that there was an amend-



ment to the plan which caused loss of
vested benefits.¹³

The Ninth Circuit and the D.C. Circuit are thus in direct conflict on the crucial issue of what constitutes an amendment to a pension plan. The D.C. Circuit apparently requires that the rule change itself state that it is altering the vesting schedule or reducing accrued benefits. The Ninth Circuit has taken a more realistic view; it recognizes that, although the rule change alone may not alter rights, when

13/ See also Shaw v. Int'l Assn. of Machinists & Aerospace Workers Pension Plan, 563 F.Supp. 653, 657 (C.D.Cal. 1983) (1976 decision to phase out cost-of-living increases in future is amendment decreasing accrued benefits and is invalid because "[t]he prohibition set forth in section 1054(g) is absolute, absent compliance with the section 1082(c)(8)(C) procedure"); Ford v. New York Central Teamsters Pension Fund, 506 F.Supp. 180, 183 (W.D.N.Y. 1980), aff'd 642 F.2d 664 (2d Cir.1981).



Trustees exercise the discretion granted them under the change, rights are altered.

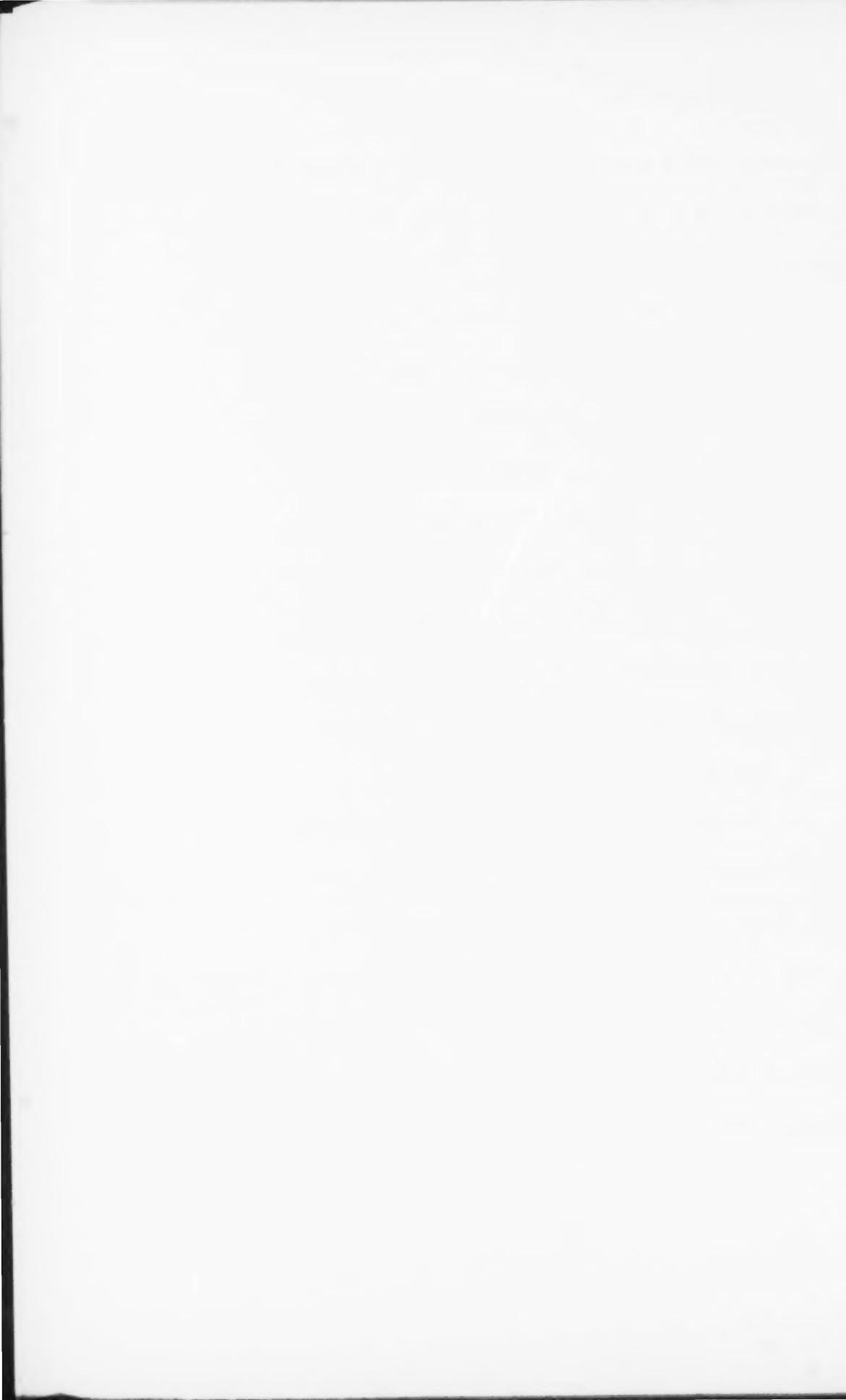
One circuit has thus reasoned that the Trustees of the National Shopmen Pension Fund, in passing and applying section 2.09 of their plan, amended that plan; another circuit has concluded that the Trustees of the National Shopmen Pension Fund, in passing and applying section 2.09 of their plan, did not amend their plan. The immediate consequence is that some participants (Fentron employees) are not subject to the effects of section 2.09, while other participants remain subject to that section of the plan. The long-range consequence is that the crucial act of amending a pension plan, even the same pension plan, is defined differently in



different circuits. The petition should therefore be granted to resolve this conflict.

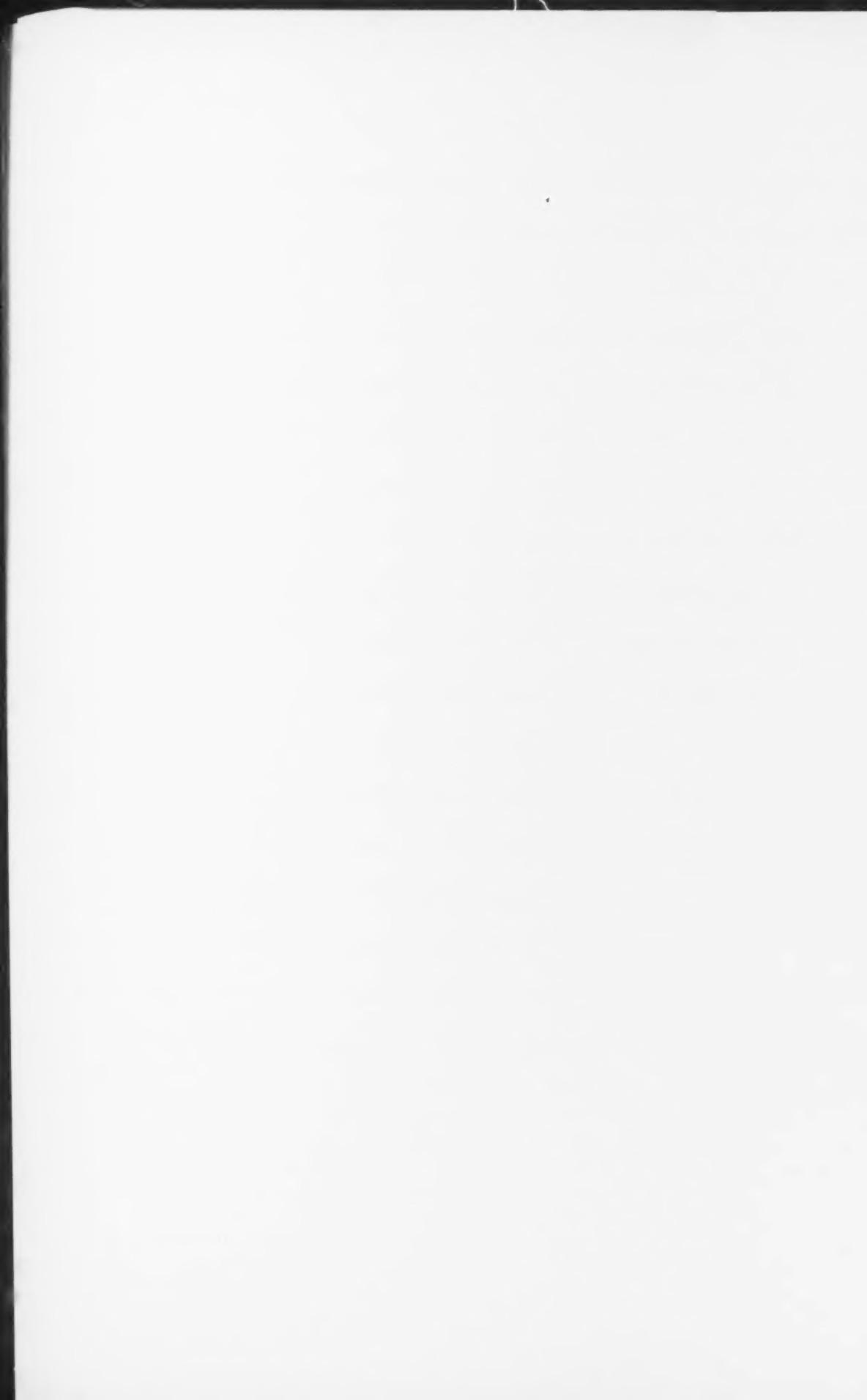
2. In constructing its strict view of an amendment, the Court of Appeals below denigrated plaintiffs' argument by hypothesizing "its logical consequences." (App. A, 51a.) This discussion is premised on legal and factual misperceptions, and it also ignores a more important consideration: the "logical consequences" of the Trustees' action and of the Court's decision.

To demonstrate the alleged weakness of plaintiffs' argument, the Court contends that it would logically require the application of 29 U.S.C. §§1053(c) (1)(B), 1054(g) and 1082(c)(8) in every instance where a participant dies. The analysis is based on another exception



to the nonforfeitality requirement, a participant's death. 29 U.S.C. §1053(a)(3)(A).

The Court, however, misunderstands the different nature of that event from the instant circumstance. A participant's death is merely the condition precedent to an automatic forfeiture always required by the plan. It is the event which triggers a pre-existing rule. The plan is not amended when a rule of general applicability requires a forfeiture upon the occurrence of a particular event. By contrast, when Trustees alter the plan to give themselves the power to cancel past



service credits, and then exercise that power, the plan has been amended.¹⁴

In misunderstanding the logical consequences of plaintiffs' argument, the Court of Appeals also ignored the other side of the coin: the consequences of the Trustees' action and the Court's validation of that action. The Court has provided trustees throughout the country with a vehicle to ignore congressional purpose.

It must, at a minimum, be agreed that Congress did intend, in some cir-

14/ The forfeiture by death, or by the occurrence of any event activating an existing rule, does not contradict one of ERISA's major concerns, protection of the expectations and reliance interests of participants. See, e.g., H. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S.Code Cong. & Admin. News 4670, 4725; H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), reprinted in [1974] U. S. Code Cong. & Admin. News 5038, 5057, 5067-5068. In contrast, an amendment, by definition, changes expectations.



cumstance, that trustees would be subject to §§1053(c)(1)(B) and 1054(g).

The Court has held, however, that these obligations can be avoided through the semantical exercise of amending the plan to give trustees broad and undefined discretionary power. Consequently, in any situation affecting the vesting schedule or accrued benefits, trustees can detour around §§1053(c)(1)(B) and 1054(g) simply by adding a provision which permits them to take unspecified certain action in certain circumstances. Under the reasoning of the Court below, there would be no amendment: benefits which had previously been untouchable will be reduced or lost altogether, but the protective provisions of ERISA will be unavailing.



This result subverts the clear purpose of ERISA. Not only does it allow trustees to ignore provisions expressly designed to control their actions, but it encourages trustees to alter plans to include vague rules, the actual effect of which cannot be known until the trustees decide how to exercise their discretion. One of ERISA's major purposes was to provide sufficient information and guarantees to participants that they could evaluate the likelihood of their receiving a pension and in what amount. See 29 U.S.C. §1001. Provisions such as section 2.09 eliminate the certainty regarding pension eligibility.

If, at some point, the Trustees had amended the plan to include a rule which dictated that the withdrawal of a con-



tributing employer would result in the cancellation of past service credits, presumably the Court of Appeals below would have recognized that this change in the plan implicated either 29 U.S.C. §1053(c)(1)(B) or §1054(g). Here, the same result was accomplished through a combination of events. If that combination is perceived as not an amendment to the plan affecting the vesting schedule or decreasing accrued benefits, then the rules surrounding plan amendment will have lost their meaning.

The threat to the viability of ERISA's amendment requirements occasioned by the decision of the Court of Appeals below requires review of that decision by this Court.



CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit.

June, 1984

GILL DEFORD
NEAL S. DUDOVITZ
BURTON D. FRETZ
SHARON GUIDA
LUTHER BLACKISTON

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1621

GEORGE STEWART, et al.

v.

NATIONAL SHOPMEN PENSION FUND, et al.,
APPELLANTS

peal from the United States District Court
for the District of Columbia
(Civil Action No. 82-03055)

ARGUED October 20, 1983

Decided March 30, 1984

Thomas J. Hart, with whom Lena S.
zulin was on the brief, for appellants.

Gill Deford, with whom Burton D. Fretz
is on the brief, for appellees.

Gerald M. Feder and David R. Levin were
on the brief for amicus curiae, National
Coordinating Committee for Multiemployer
Plans, urging reversal.



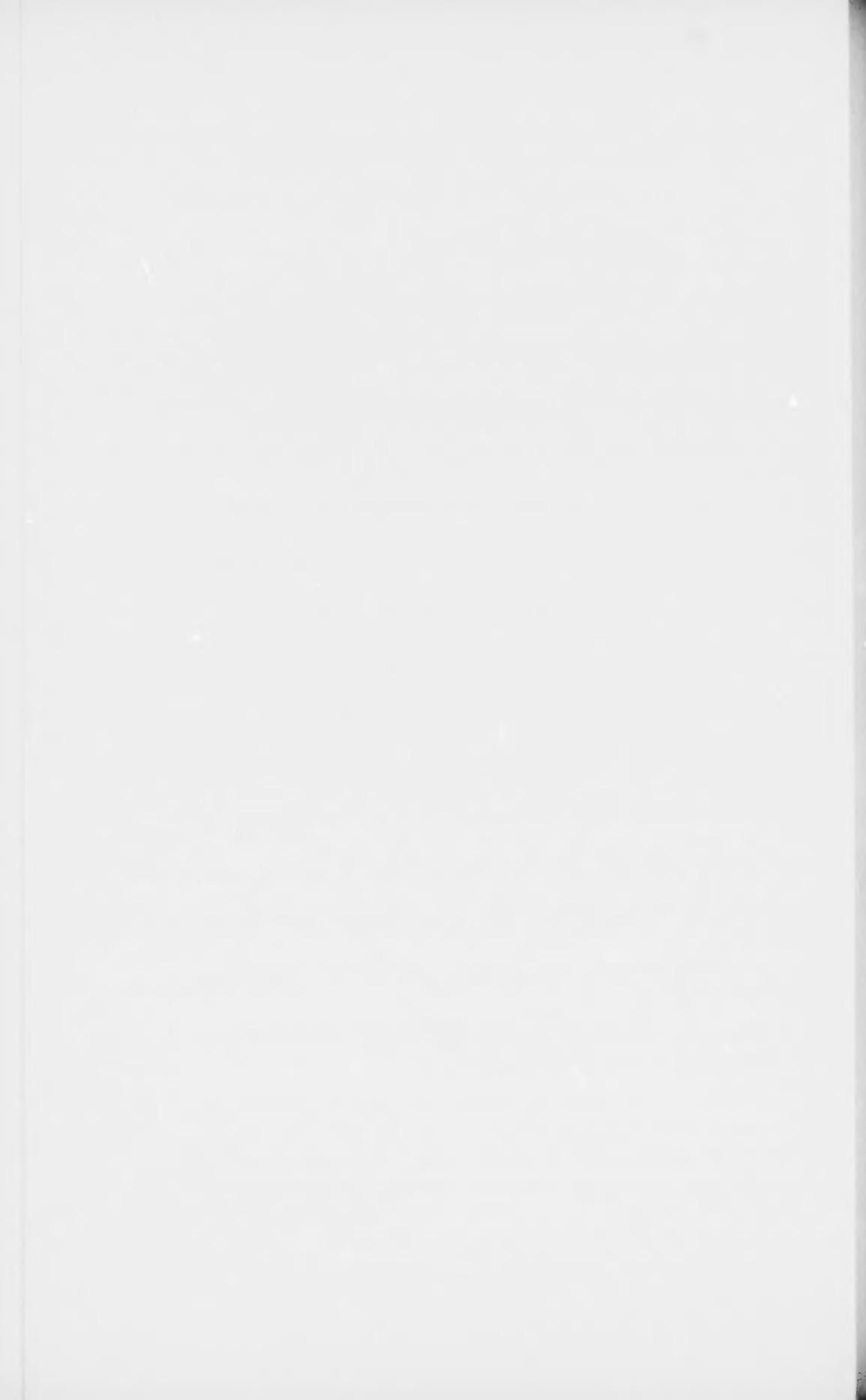
Before: WRIGHT and GINSBURG, Circuit
Judges, and MacKINNON, Senior
Circuit Judge.

Opinion for the Court filed by Senior
Circuit Judge MacKINNON.

MacKINNON, Senior Circuit Judge: This is a class action, brought on behalf of employees and former employees of Anchor Post Products, Inc. ("Anchor"), against the National Shopmen Pension Fund (the "Fund").¹ The fund cancelled certain employee service credits of members of the class, which resulted in a reduction of pension benefits to the class members. The district court found that the Fund's actions violated provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Stewart v. National Shopmen Pension Fund,

¹The National Coordinating Committee for Multiemployer Plans, a group of 140 employee pension plans, has filed a brief as amicus curiae urging reversal of the district court.



563 F.Supp. 773 (D.D.C. 1983). We reverse the district court and remand the decision for consideration of other issues in the case.

I.

The National Shopmen Pension Fund is a multiemployer pension fund as defined by ERISA §§2(2), 3(37)(A).² Its board of trustees is made up of three representatives of the International Association of Bridge, Structural and Ornamental Iron Workers (the "Union") and three representatives of participating employers. The Fund was in

² 29 U.S.C. §§1002(2), (37)(A) (1982). A "multiemployer plan" is one

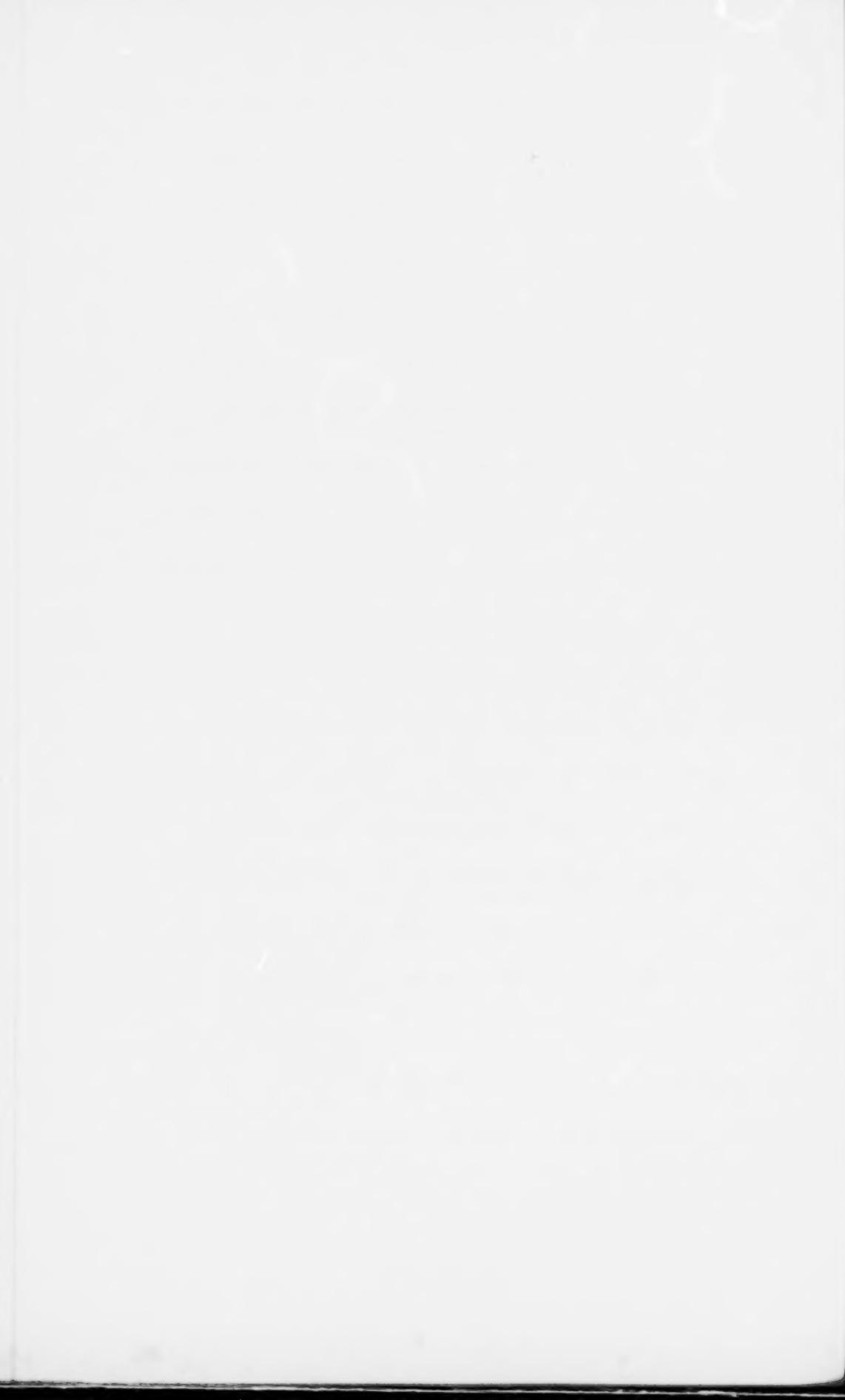
- (i) to which more than one employer is required to contribute,
- (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
- (iii) which satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation.

Id. §1002(37)(A).

existence prior to the enactment of ERISA, and has been modified to comply with the relevant provisions of that statute. The Internal Revenue Service has certified that the Fund is in compliance with applicable ERISA standards (J.A. 203-05).

Most of the facts are stipulated. In 1969, Anchor entered into a collective bargaining agreement with the Union at Anchor's plant in Baltimore, Maryland. The agreement provided, inter alia, that Anchor would begin making pension contributions to the Fund on behalf of its employees, who prior to 1969 had not been enrolled in the Fund.

As was its usual practice, the Fund, in computing pension benefits, granted full credit to all Anchor employees for the years they spent with Anchor prior to enrollment in the pension plan. These pre-enrollment credits are known as "past" or "precontributory" service credits. Service



credits earned after an employer has begun contributing are known as "future" or "contributory" service credits. Ordinarily, precontributory and contributory service credits are added together to determine the amount of the individual employee's pension.³

Anchor continued to make contributions to the Fund until 1979, when it closed its Baltimore plant. The closing terminated Anchor's obligations under its collective bargaining agreement. Anchor stopped making contributions to the Fund and withdrew from all participation in it. To assess the impact of Anchor's withdrawal, the Fund authorized an actuarial study by the Martin E. Segal Company ("Segal"). The Segal study showed that Anchor had, over the ten-year

³ Pensions granted by the Fund are based on two factors: the level of the employer's contribution rate, and the individual employee's total years of service. The Fund provides a schedule by which individual employees can calculate their expected benefits.



period, contributed \$337,129 to the Fund. Its allocated share of Fund assets at termination was \$298,912. The total vested liability of the Fund to Anchor employees was \$1,049,181. Thus, the total "unfunded liability"--the amount of pension liability for which no one had paid anything into the Fund--was \$750,268, or about 1.8 percent of the total assets of the Fund (J.A. 121,207).⁴

⁴This "unfunded liability" results from the system under which multiemployer pension funds collect contributions and calculate benefits. Typically, when a new employer joins a fund, its employees receive precontributory service credits for the years they spent with the employer prior to joining the fund. For example, a particular employee who had worked for the employer for 20 years before the employer joined the fund would immediately receive 20 years of service credit. His pension would be based on 20 years of service even though his employer, at the time it joined, had contributed nothing to pay for that pension. This initial liability is totally unfunded. To pay for this unfunded liability, the pension fund collects on a regular basis from the employer an amount in excess of the actual cost of pension coverage for the contributory service. This excess amount is used over

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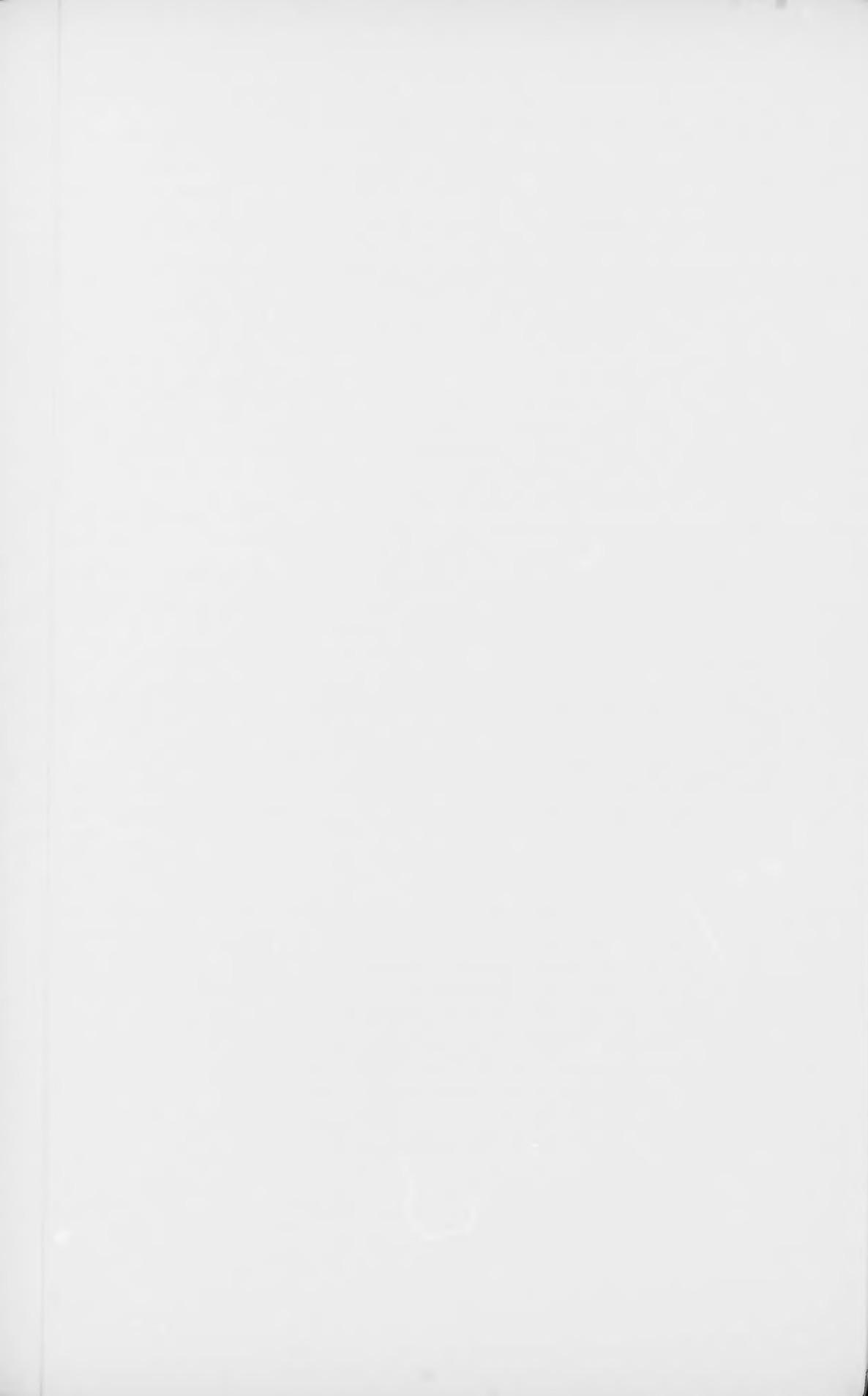


A provision of the Fund's 1976 plan permits the Fund, in cases where unfunded liability is "dumped" into it by an employer, to cancel the precontributory service of present and former employees of that employer. This provision, § 2.09, states:

(a) If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the Trustees are empowered to cancel any obligations of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, the Employers who remain as Contributing Employers, nor the Union be obligated

4 (cont.)

time to amortize the unfunded liability. The unfunded liability gradually is reduced by the stream of employer payments. This continuing stream is necessary to make the system work; when, as in this case, an employer withdraws after a relatively short time, its payments into the fund have not completely reduced the unfunded liability, and the fund is left with liabilities for which it has received no payments.



to make such payments.

(J.A. 181.)

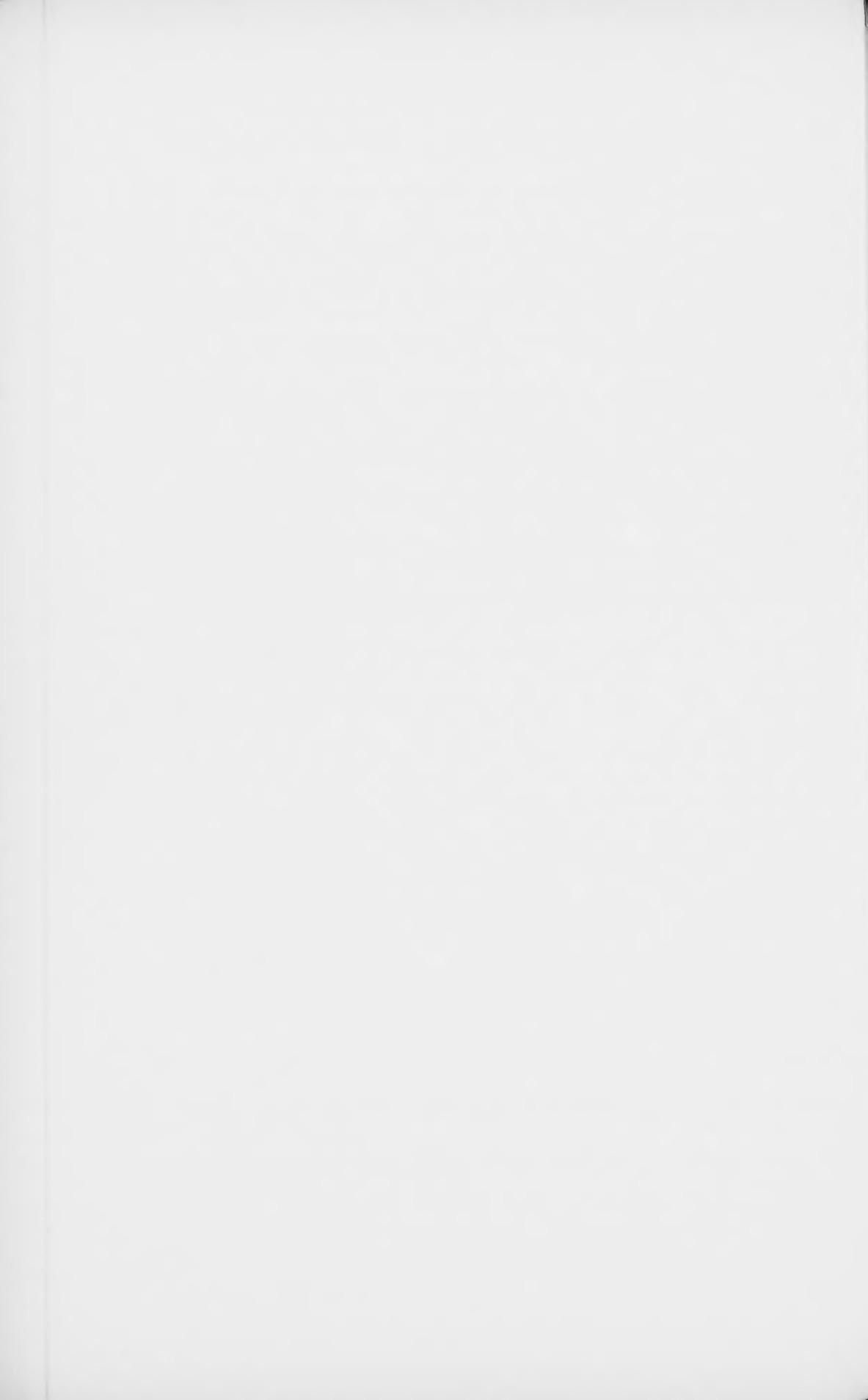
On the basis of its study, Segal recommended that the Fund use §2.09 to cancel the precontributory service credits of the Anchor employees. The Segal report concluded that even if all precontributory service were cancelled, the Fund would still face an unfunded liability of \$154,728, which it would have to absorb (J.A. 207). (As of 1980, the Fund had total assets of \$40,700,919 (J.A. 121).) The report's recommendation was unanimously adopted by the trustees in March, 1980 (J.A. 210). All precontributory service of Anchor employees was cancelled for purposes of determining benefits.

George Stewart and Lee Roy Warren are two of the affected Anchor employees. Stewart had been an employee of Anchor since 1940. When Anchor joined the Fund, he was granted 23 years of precontributory service



for his work prior to 1969. He continued to work for another 2.7 years after Anchor joined the Fund, and then retired. His initial pension, calculated on 25.7 years of total service, was \$80 per month (J.A. 114-18). Warren began working for Anchor in 1959. He had earned 10.6 years of pre-contributory service prior to 1969. He continued working for Anchor until the Baltimore plant closed in 1979, earning 10.4 years of contributory service. He applied for early retirement when the Anchor plant closed (J.A. 119-20), and his pension, if calculated on his 21 years of total service, would have been \$89 per month.

When the Fund cancelled the precontributory service, both Stewart and Warren suffered significant pension cuts. Stewart's pension, now calculated solely on his 2.7 years of contributory service, came to only \$9 per month. Warren had his pension cut to



\$45 per month, calculated solely on his 10.4 years of contributory service.

Stewart and Warren brought this class action, seeking to have the Fund's application of §2.09 declared invalid and to have their full pension benefits restored. The district court held that the trustees' actions violated ERISA. There are two issues. First, as a threshold matter, is the Fund collaterally estopped from arguing the validity of its actions by the Ninth Circuit's decision in Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982)? Second, did the action of the Fund's trustees in cancelling the precontributory service of Anchor employees violate specific procedural requirements of ERISA?

II.

The plaintiffs' collateral estoppel (issue preclusion) claim, which the district

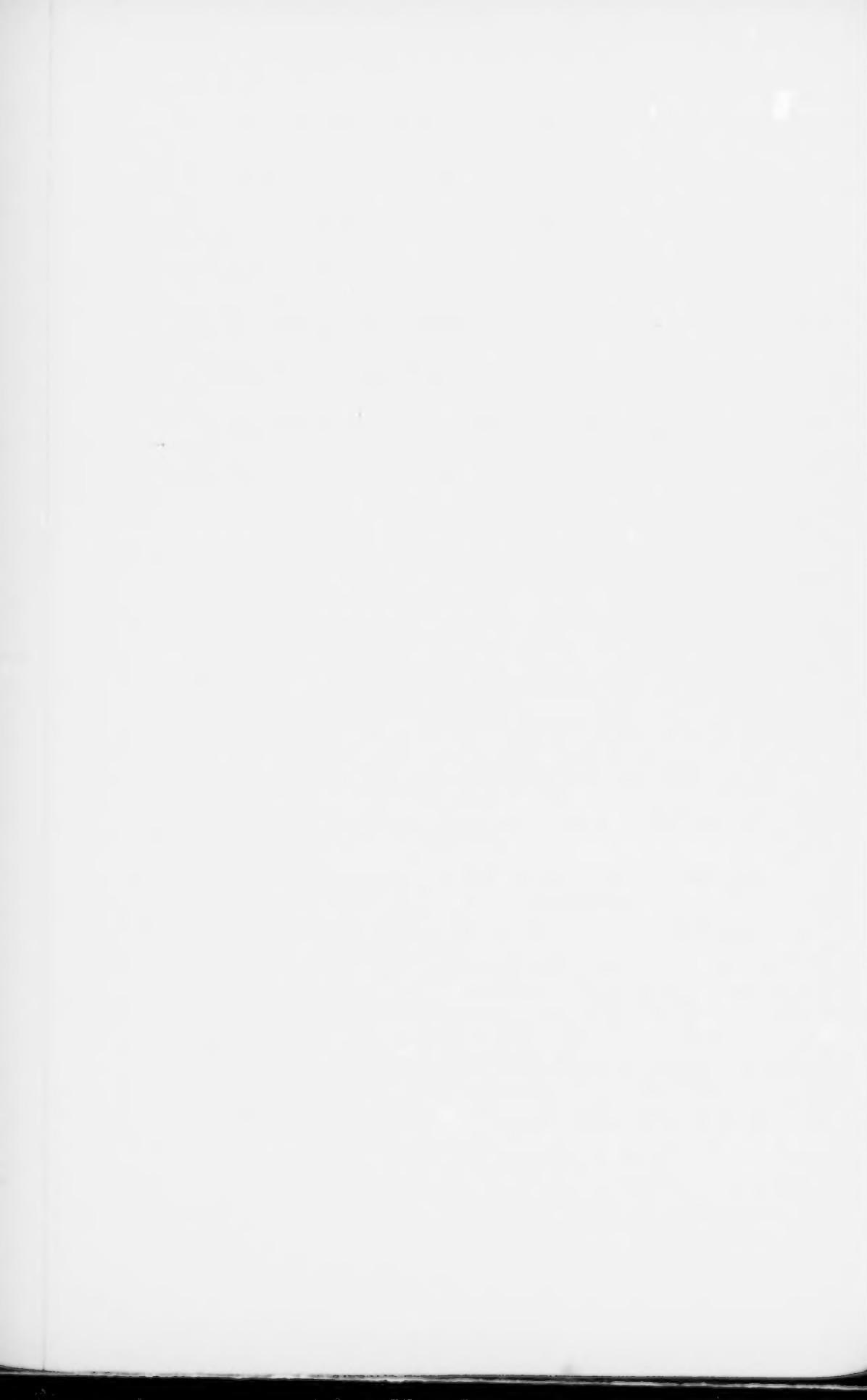
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court rejected,⁵ depends upon the effect of the Ninth Circuit's Fentron decision. The plaintiffs argue that the court in Fentron passed on the same section of the same plan, and found it invalid. Hence, they assert, the Fund should be precluded by the Fentron adjudication from arguing here that the provision is valid. The plaintiffs were not parties to the Fentron decision. They seek to use collateral estoppel offensively under the doctrine of Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979).

Collateral estoppel bars relitigation of issues that were "actually and necessarily determined by a court of competent jurisdiction."

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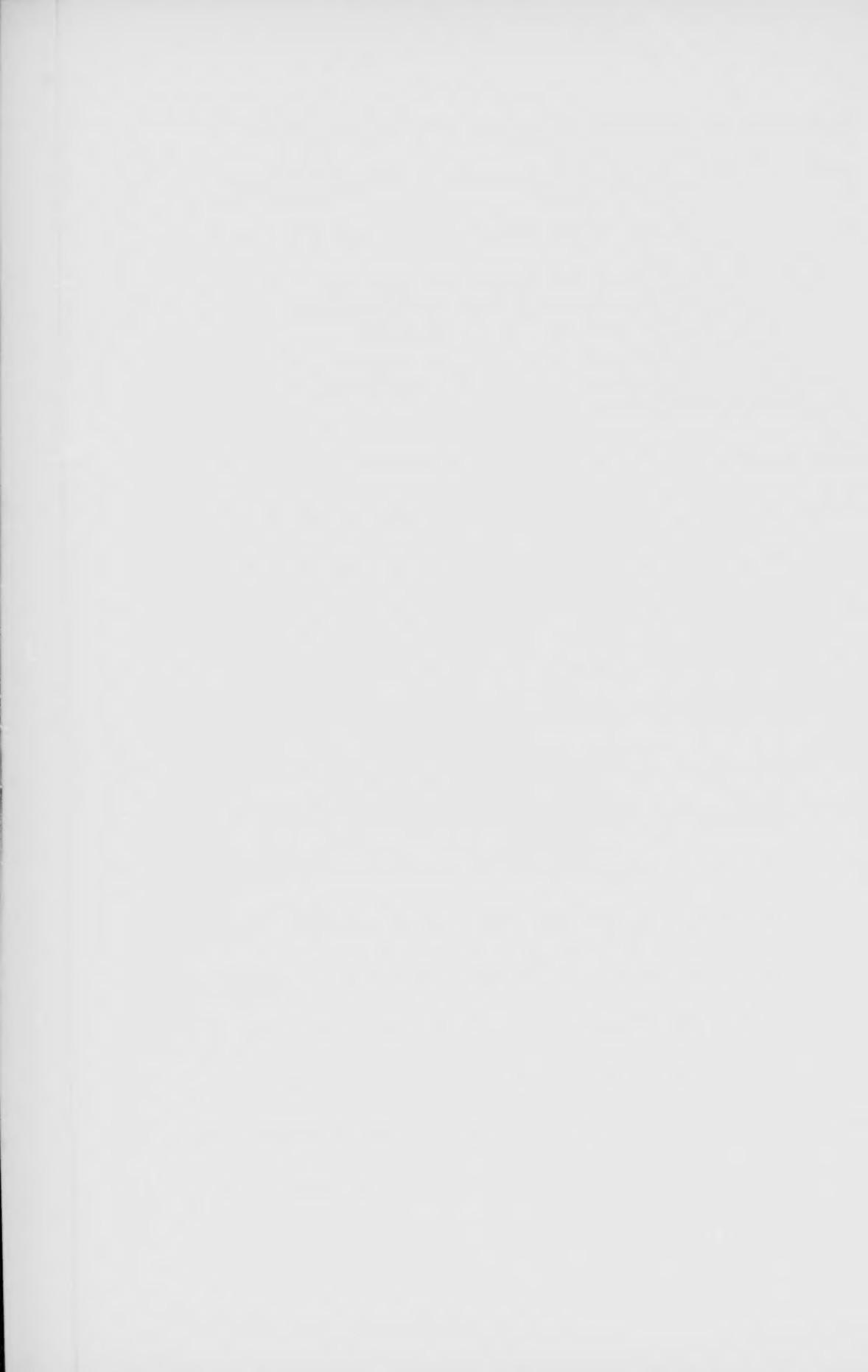
The district court found that "a significant factual difference between [this case and Fentron] renders the case at bar sufficiently different to demand individual consideration." The court held that "[t]he issues Fentron decided are not . . . sufficiently similar to satisfy the requirements of collateral estoppel." 563 F.2d at 776 n.5.



Montana v. United States, 440 U.S. 147, 153 (1979) (emphasis added). The Restatement phrases it this way:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive....

Restatement (Second) of Judgments §27 (1982) (emphasis added). The Fund thus is precluded only from litigating issues that were actually and necessarily decided in Fentron. The plaintiffs assert flatly that "Fentron fully evaluated the identical rule at issue in this case and found it illegal." Brief of Appellee at 36. On the contrary, the Fentron court specifically refrained from holding that 2.09 was "invalid on its face," holding only that 2.09 as applied in that case violated ERISA. 674 F.2d at 1306. We therefore must determine the extent to which the acts of the trustees were held to be violations by the Ninth Circuit.



In Fentron, the Fund relied on §2.09 to cancel precontributory service credits of employees whose employer had effectively withdrawn from the Fund.⁶ The Fund cancelled the benefits for purposes of both vesting (i.e., the employee's right to receive a pension) and calculation of benefits (i.e., the amount of the pension to which the employee has a right). Thus, if an employer in Fentron had 20 years of precontributory service, he would be denied any pension because the Fund requires a minimum of 10 years of service for vesting. All of the

⁶ Fentron involved an employer (Fentron) which had joined the Fund in 1971, pursuant to a collective bargaining agreement. When a subsequent collective bargaining agreement expired in 1978, the Fund's trustees refused to take any more contributions from Fentron, and unilaterally cancelled all precontributory service credits of Fentron employees. 674 F.2d at 1302-03. The trustees informed employees that if they left Fentron and joined another employer they would regain all of their lost service credits. Id. at 1303. The employer and the employees together brought suit against the fund.



employees in Fentron had less than 10 years of contributory service. 674 F.2d at 1306. The Fund's cancellation of benefits for all purposes thus completely divested employees of their vested right to a pension, and deprived them of pension benefits even for their contributory service.

The Ninth Circuit held that such benefit divestiture, although authorized by the Fund's plan, amounted to a "vesting schedule amendment":

Before the cancellation of Past Service Credits, the benefits of all members of the class were vested under the 1969 Plan. The effect of cancelling Past Service Credits was to diminish the pension credits of all members, each of whom at that time had to have Past Service Credits to qualify for pension vesting under the 1969 Plan. The cancellation thus divested previously vested employees, who then would only be eligible for vesting in the future, if at all. The trustees' use of section 2.09 was therefore a vesting schedule amendment and, in the absence of the option to compute benefits under the 1969 Plan, is prohibited by ERISA §203(c)(1)(B).

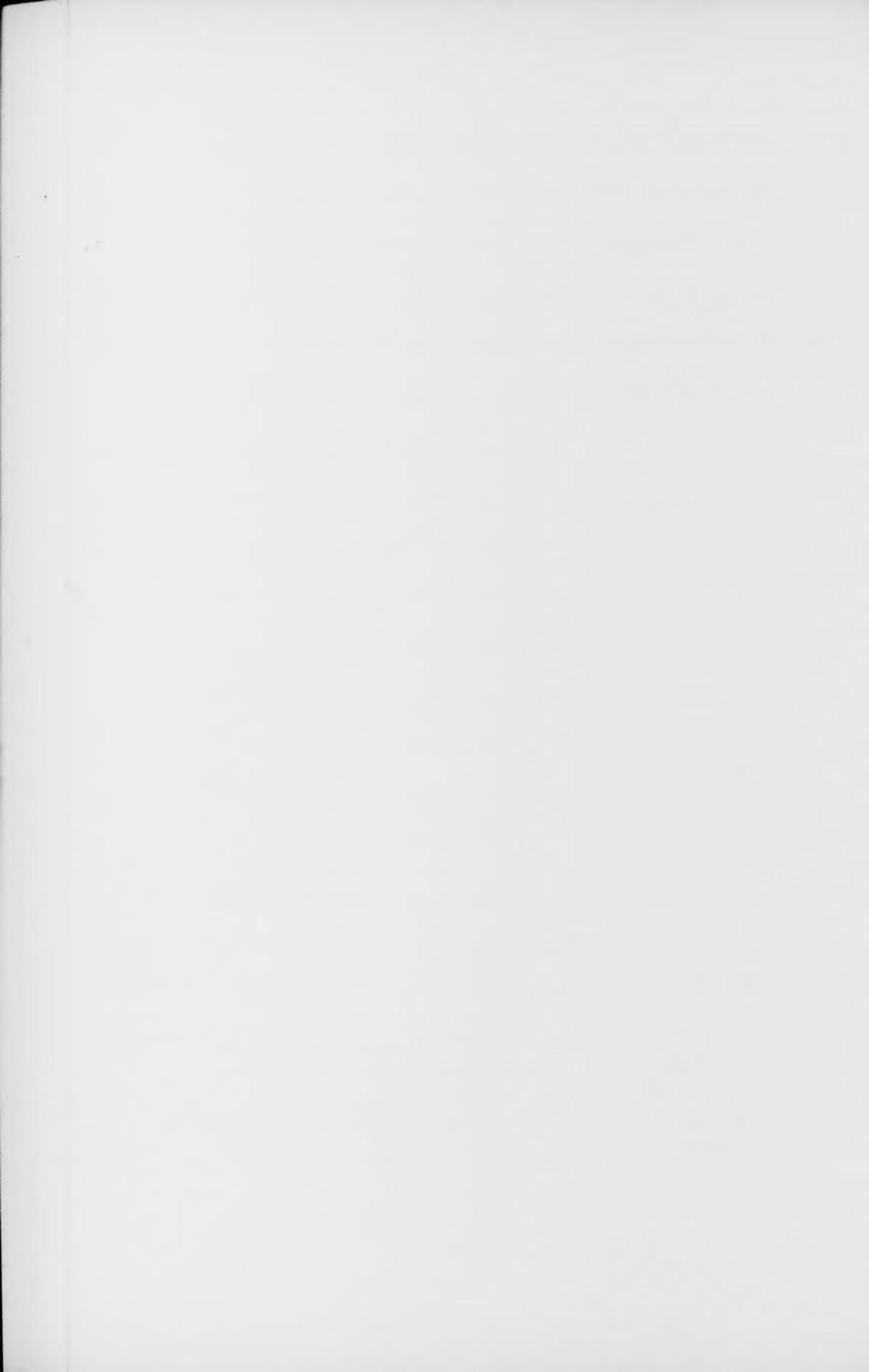


Id. (emphasis added). According to the Fentron court, the use of §2.09 to fully divest participants changed their vested status, and hence required the Fund to use a statutory procedure that the trustees had not followed.⁷

In the case at bar, the Fund has not attempted to divest the plaintiffs completely of their right to a pension.⁸ All of the class members will receive pensions, although such pensions will be based solely on the years of contributory service. The issue in this case is whether accrued benefits can be reduced, not whether an employee may be completely divested. The distinction is between the right to receive a pension and

⁷ See part III infra.

⁸ The Fund does not here challenge the result in Fentron. Its procedures for cancelling or reducing benefits apparently have been altered to conform to the decision in that case.



the amount of the pension. We do not believe that the Fentron case reached the question of reduction of benefits.

There is language in Fentron which arguably is broad enough to cover the issue in this case.⁹ But to the extent that such language goes beyond the issue decided in the case, it will not bar subsequent litigation of related issues. Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979); Segal v. American Telephone & Telegraph Co., 606 F.2d 842, 845 n.2 (9th Cir. 1979) (per curiam) ("relitigation of an issue . . . is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation").

That the Fentron holding did not cover situations in which only accrued benefits are reduced can be seen clearly from the Ninth Circuit's subsequent decision in

⁹ See note 24 infra.

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Elser v. I.A.M. National Pension Fund,
684 F.2d 648 (9th Cir. 1982), cert. denied,
104 S.Ct. 67 (1983). Elser, which was de-
cided only seven months after Fentron, held
that a pension fund could use a provision
substantially similar to §2.09 to cancel
precontributory service for purposes of
reducing benefits, although the court held
that such action could not be taken arbi-
trarily or capriciously. The Elser court
cited Fentron in passing, but apparently
did not consider that it addressed the
issue involved in this case since it did
not mention Fentron in connection with that
issue. Elser, in fact, cited with approval
a district court case from this circuit,
Central Tool Co. v. International Associa-
tion of Machinists National Pension Fund,
523 F.Supp. 812 (D.D.C. 1981), appeal
docketed, Nos. 81-2047 & -2056 (D.C. Cir.
Sept. 25, 1981), which held that in an

appropriate case pension funds could reduce benefits by cancelling precontributory service.

In sum, we do not interpret the Fentron decision as holding that §2.09 could never be applied to reduce benefits to employees with vested pension rights. The Fund is therefore not collaterally estopped from litigating the validity of the benefit cancellation involved in this case to the extent that they were reduced.¹⁰

¹⁰ Even if we were convinced that the Fentron decision had reached the issue involved in this case, we would be reluctant to apply collateral estoppel here. Collateral estoppel should not be applied against a party when such application would be unfair. That may be the case as to "unmixed questions of law":

Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

Montana v. United States, 440 U.S. 147, 162 (1979) (quoting United States v. Moser, 266

(cont.)



III.

We come then to the main issue in this case. Does a pension fund have the right

10 (cont.)

U.S. 236, 242 (1924)). This principle has been incorporated into the Restatement:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

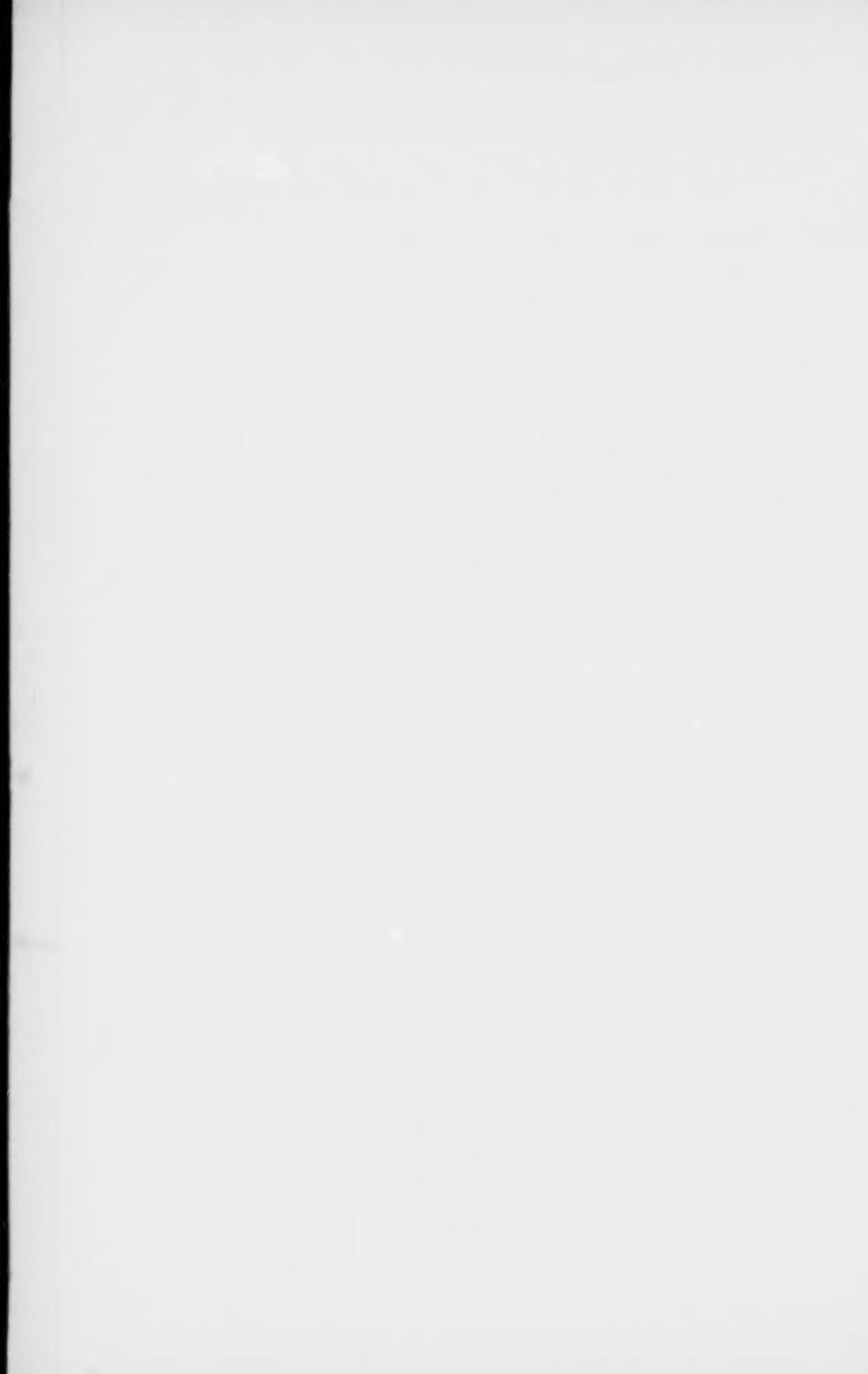
... .

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

... .

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the original action

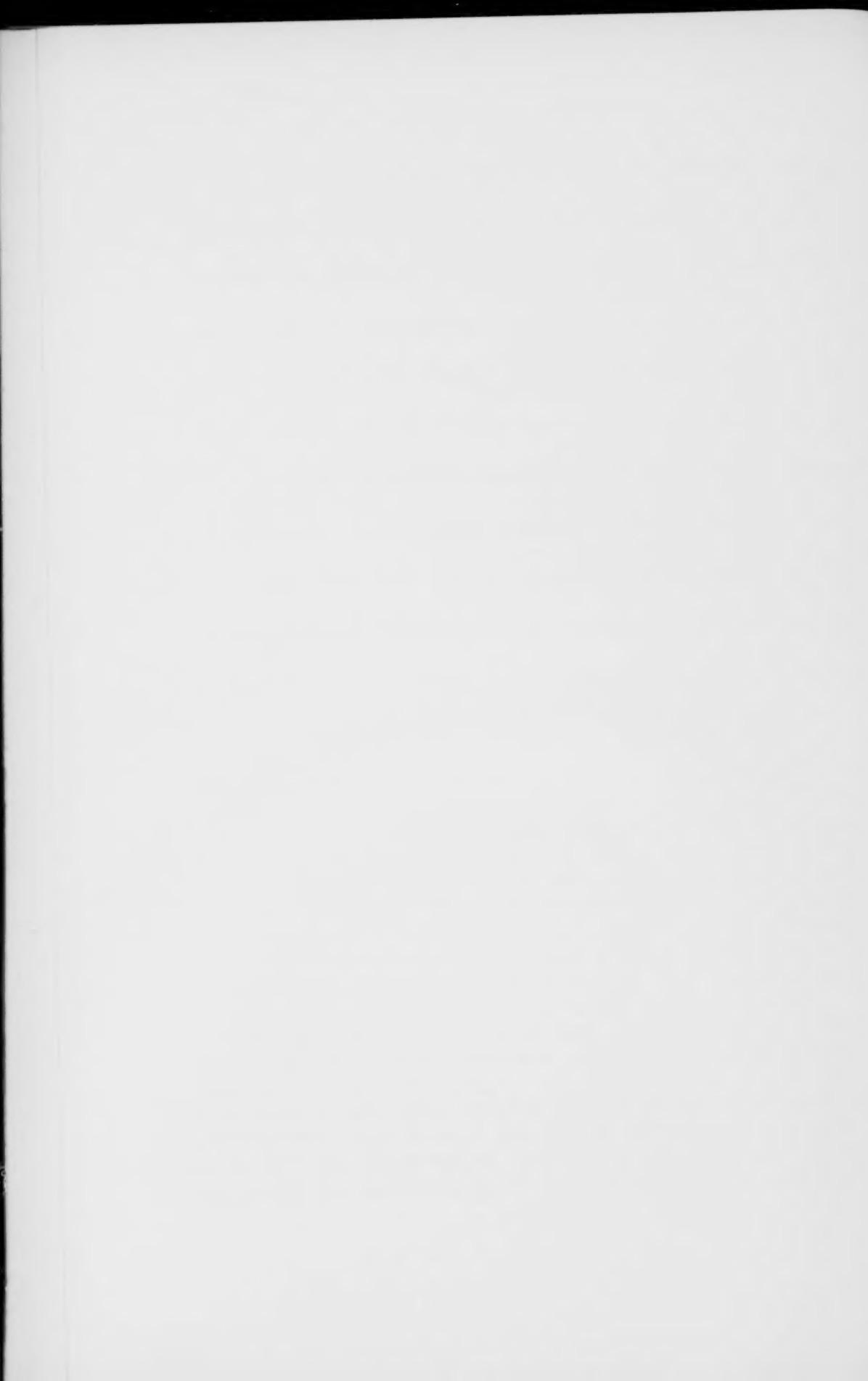
Restatement (Second) of Judgments §28 (1982). As we explained previously, we interpret Fentron as consistent with the Ninth Circuit's
(cont.)



under ERISA to use a pre-existing plan provision to cancel unilaterally, for purposes of benefit computation, the precontributory service credits of employees whose employer has withdrawn from the fund? The district court relied on two grounds in holding that such cancellation violated ERISA. First, the court held that the resulting change in pension benefits to the affected employees was a "vesting schedule amendment" that did not comply with §203(c)(1)(B) of

10 (cont.)

subsequent decision in Elser. If the plaintiffs were correct in their assertions that Fentron decided the issue involved in this case, we would be forced to find it clearly in conflict with the subsequent Elser decision. If the plaintiffs were correct, then the Fentron decision was plainly repudiated by the same court only months later. In that situation, we think that it would be unfair to the Fund to bind it forever to a decision on a question of law that the issuing court rejected only seven months later. This would be especially true in light of the important interests of the employers and employees who are presently members of the Fund, interests which would be affected adversely by reliance on the plaintiffs' interpretation of Fentron.



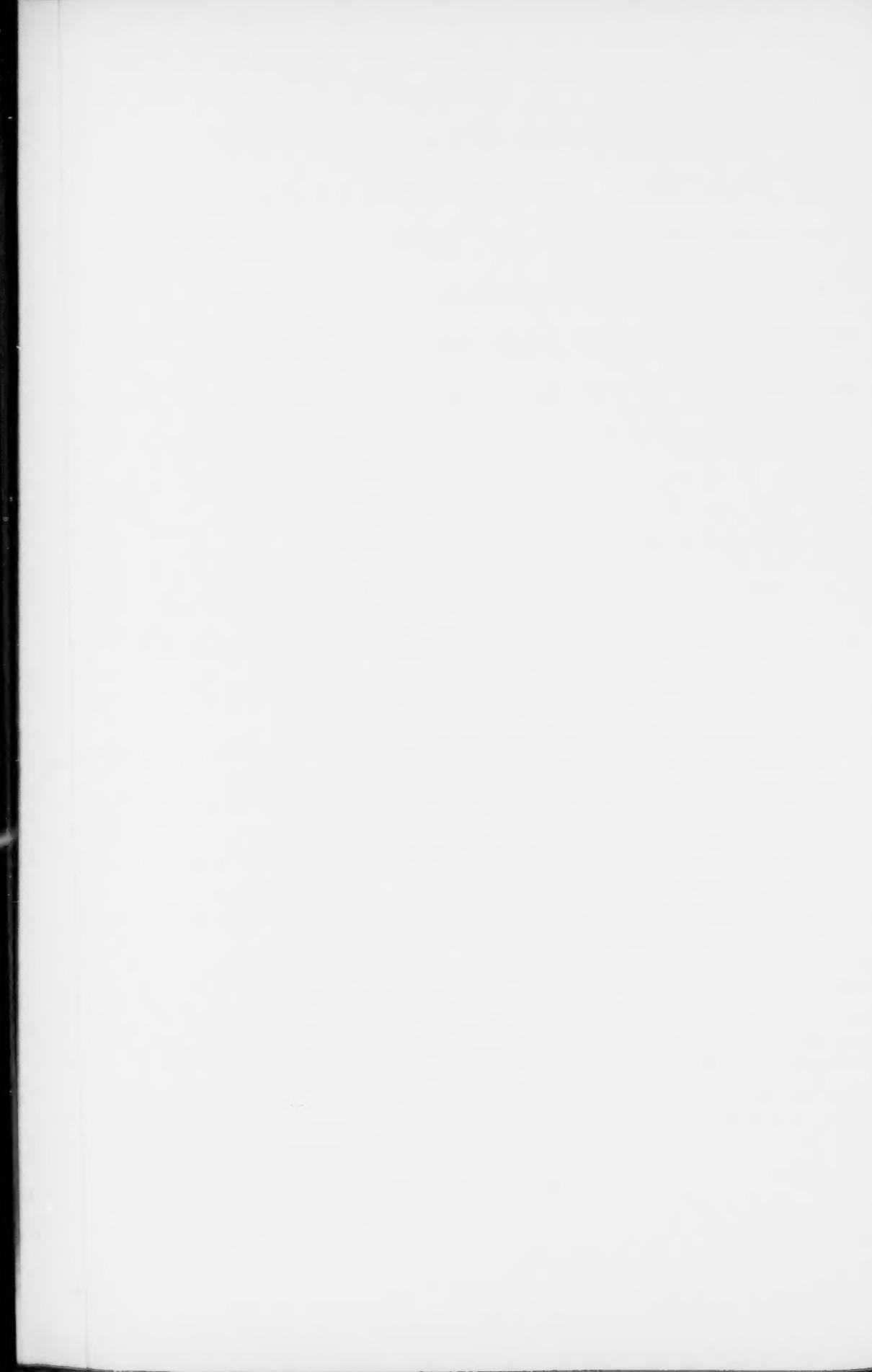
ERISA because the employees were not given the chance to have their benefits calculated under the pre-"amendment" formula. Second, the court found that the benefit reduction violated §204(g) of ERISA because it had not been submitted to the Secretary of Labor for his approval.

A.

ERISA 203¹¹ is the statutory provision that sets forth the minimum vesting standards that private pension plans must meet. Generally, plans will satisfy §203 if vested benefits become "nonforfeitable" upon the occurrence of certain conditions spelled out in this section.¹² If benefits are found to be

¹¹ 29 U.S.C. §1053 (1982).

¹² Under §203, a plan meets ERISA's vesting standards if (1) "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age," §203(a); (2) "an employee's rights in his accrued benefits derived from his own contributions are nonforfeitable," (cont.)



"forfeitable" the pension fund does not comply with ERISA. But there are exceptions to the strict nonforfeitality requirements. Section 203(a)(3) provides that a benefit will not be considered "forfeitable" on the sole ground that it can be divested or reduced in certain specified circumstances. For example, subsection (a)(3)(A) allows a pension fund to terminate benefits on the

12 (cont.)

§203(a)(1); and (3) the employee has worked a certain number of years, §203(a)(2). There are three alternative vesting schedules that a pension plan may select; any one of the three is lawful. A plan may provide that an employee simply becomes 100% vested after 10 years. ERISA §203(a)(2)(A). Vesting can occur on a graduated scale, however. A plan can provide that an employee becomes 25% vested after 5 years, with the percentage increasing until the employee is 100% vested after 15 years. §203(a)(2)(B). Another available scale uses the sum of the years of service and the age of the employee to determine the nonforfeitable amount. §203(a)(2)(C). The Fund in this case opted to permit 100% vesting of benefits after 10 years, under §203(a)(2)(A).

{

death of the employee.¹³ Subsection (a)(3)(B) permits termination of benefits if the employee who is receiving the pension goes back to work under certain circumstances.¹⁴ Subsection (a)(3)(D) allows benefits to be withheld to the extent that an employee who has contributed his own money to a pension

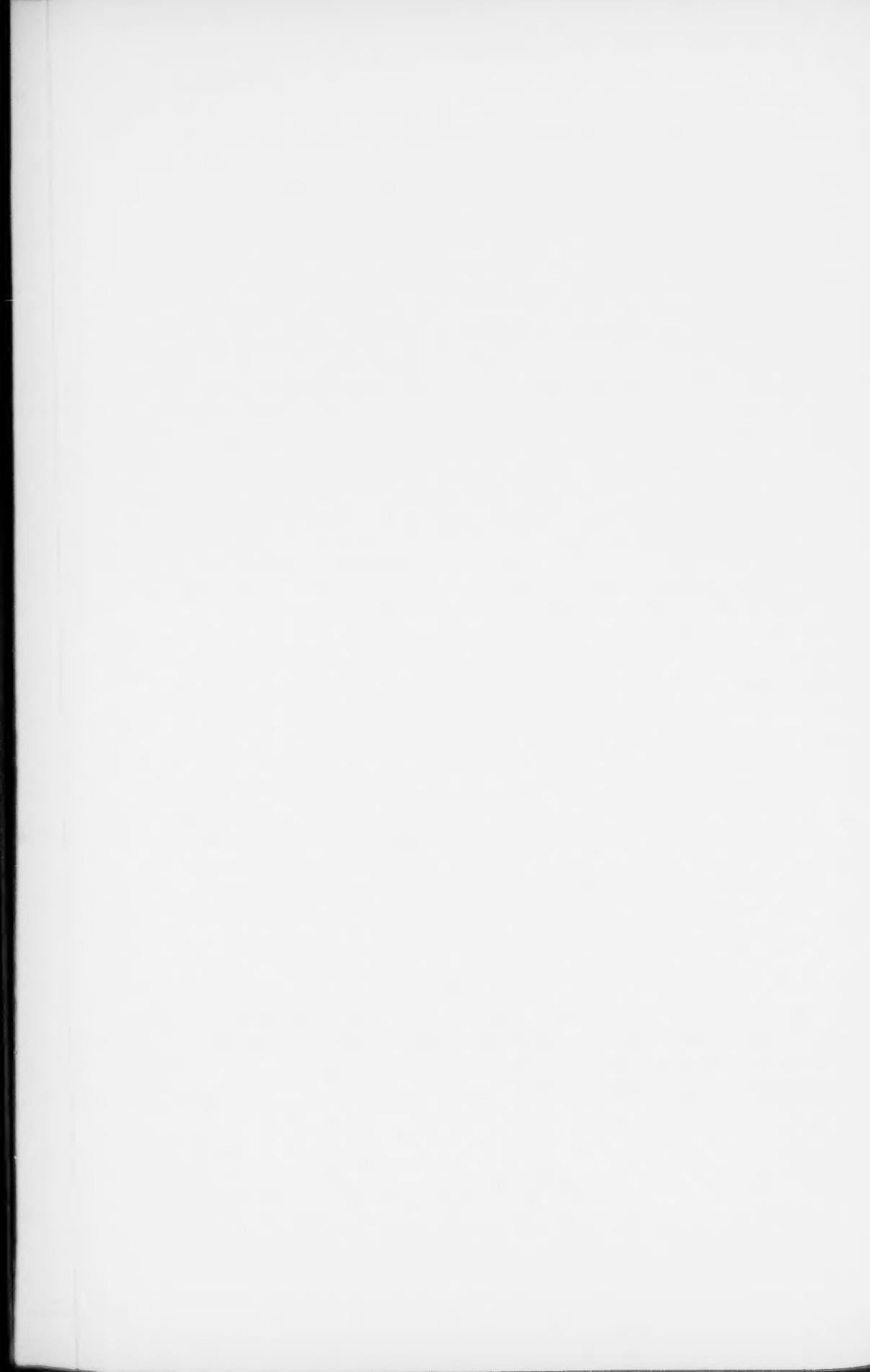
¹³"A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity)" 29 U.S.C. §1053 (a)(3)(A) (1982).

¹⁴ A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

. . .

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

Id. §1053(a)(3)(B).



fund withdraws money from his account.¹⁵

Most importantly, for purposes of this case, subsection (a)(3)(E) provides:

A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.¹⁶

¹⁵ A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions....

Id. §1053(a)(3)(D)(i). Limitations on this exception are spelled out in the remainder of the subsection.

¹⁶ Id. §1053(a)(3)(E). Subdivision (E) was a subsequent addition to subsection (a)(3). See note 21 infra.

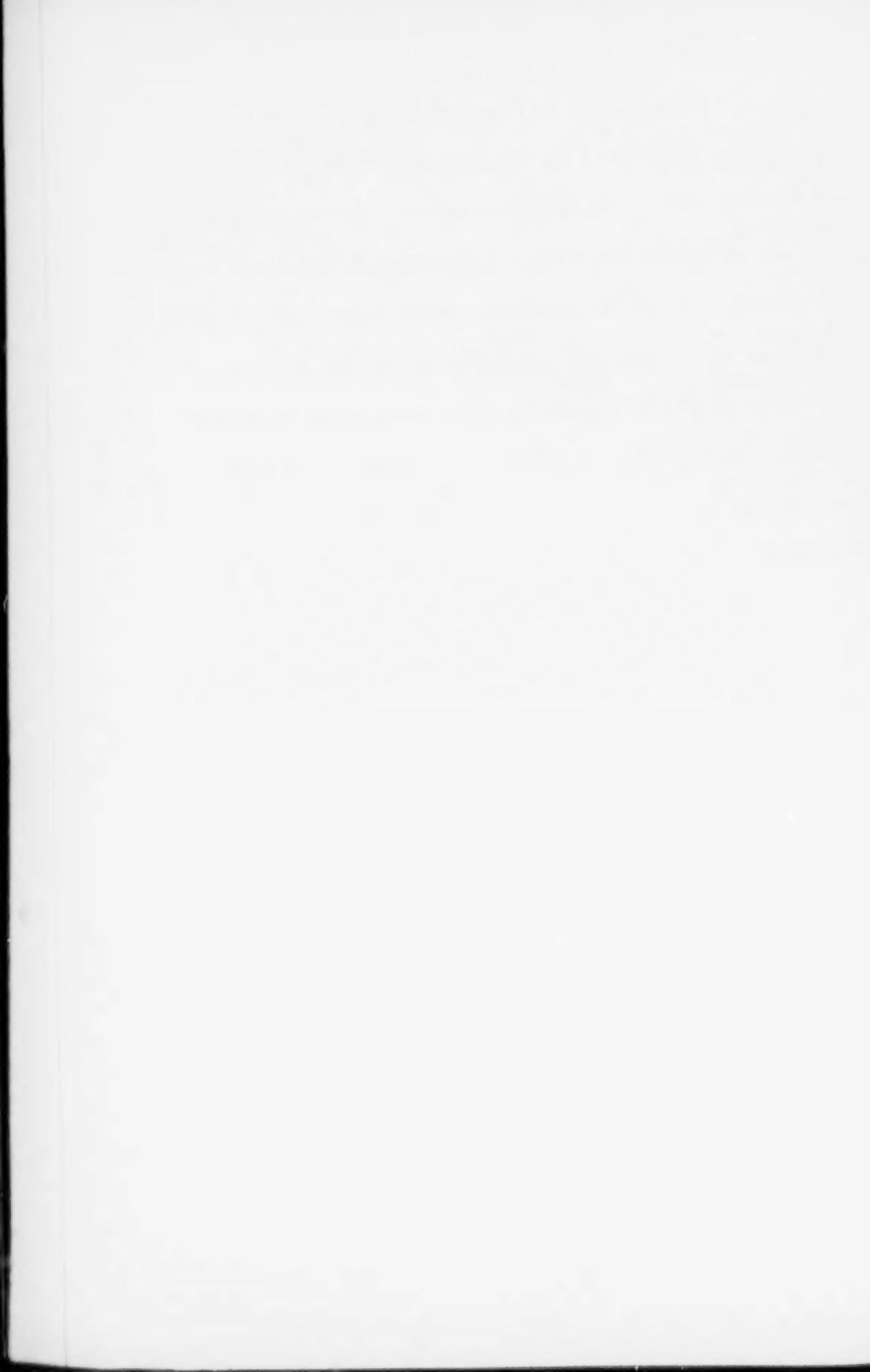


Benefit reductions or cancellations carried out under §203(a)(3) do not violate ERISA's nonforfeitality requirements. Thus, a provision permitting cancellation of precontributory service credits does not, in itself, violate the vesting requirements of §203.

The district court, however, did not believe that §203 created an automatic right to cancel precontributory service credits. In reaching its conclusion, the court relied on two other provisions of ERISA. First, the court examined §203(c)(1)(B), which provides:

A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of [the vesting provisions]. . . unless each participant is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.¹⁷

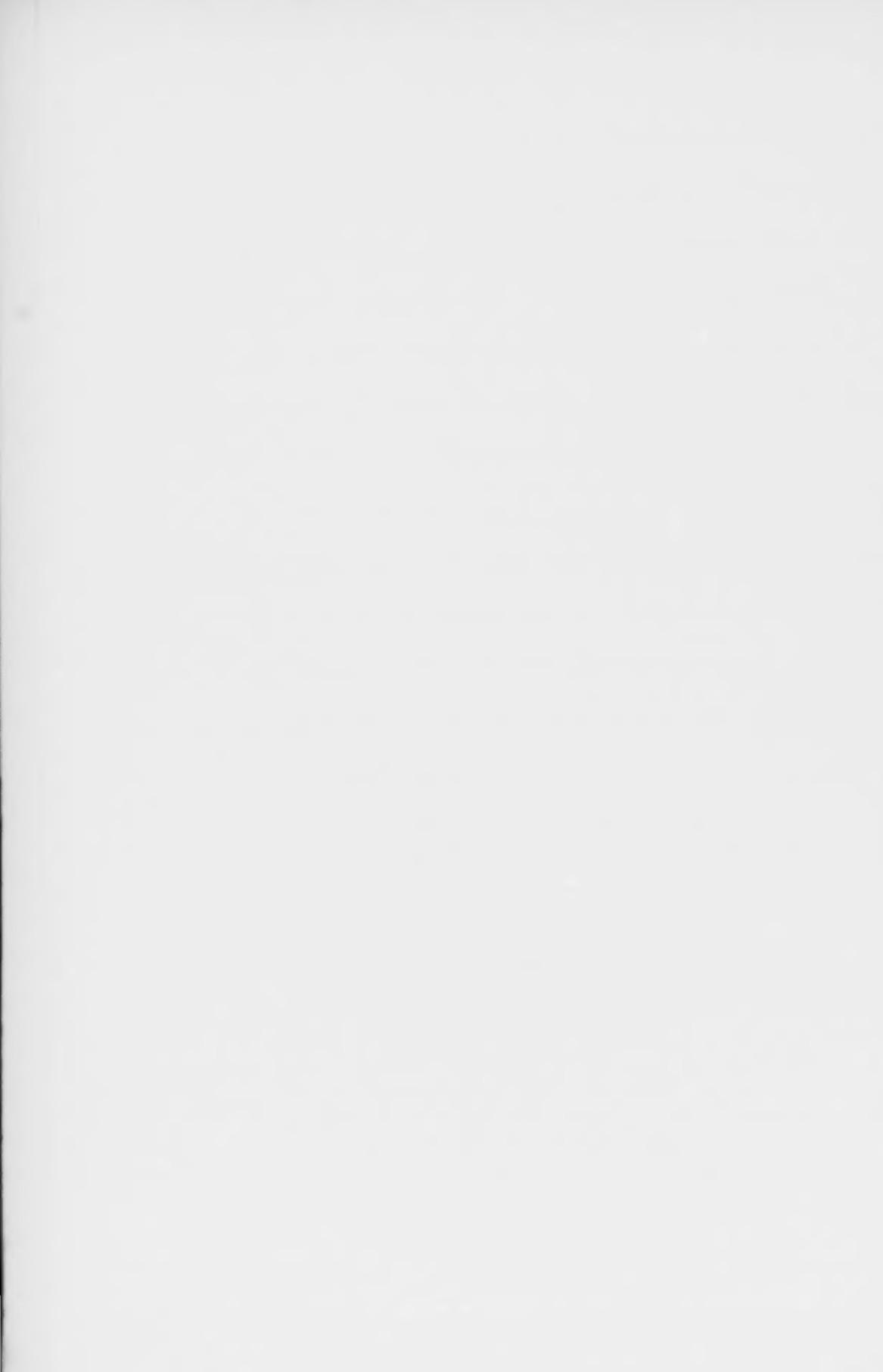
¹⁷ 29 U.S.C. §1053(c)(1)(B) (1982) (emphasis added).



Under this section, when a plan is amended to change the vesting schedule, employees who have more than 5 years of service must be given a choice; they may choose to have their benefits calculated under the pre-amendment or post-amendment plan formulas.

The district court found that the trustees' action in cancelling the service credits was an "amendment" to the plan. The court apparently believed that any reduction in the amount of benefits paid to employees who were vested would be "[a] plan amendment" to the "vesting schedule":

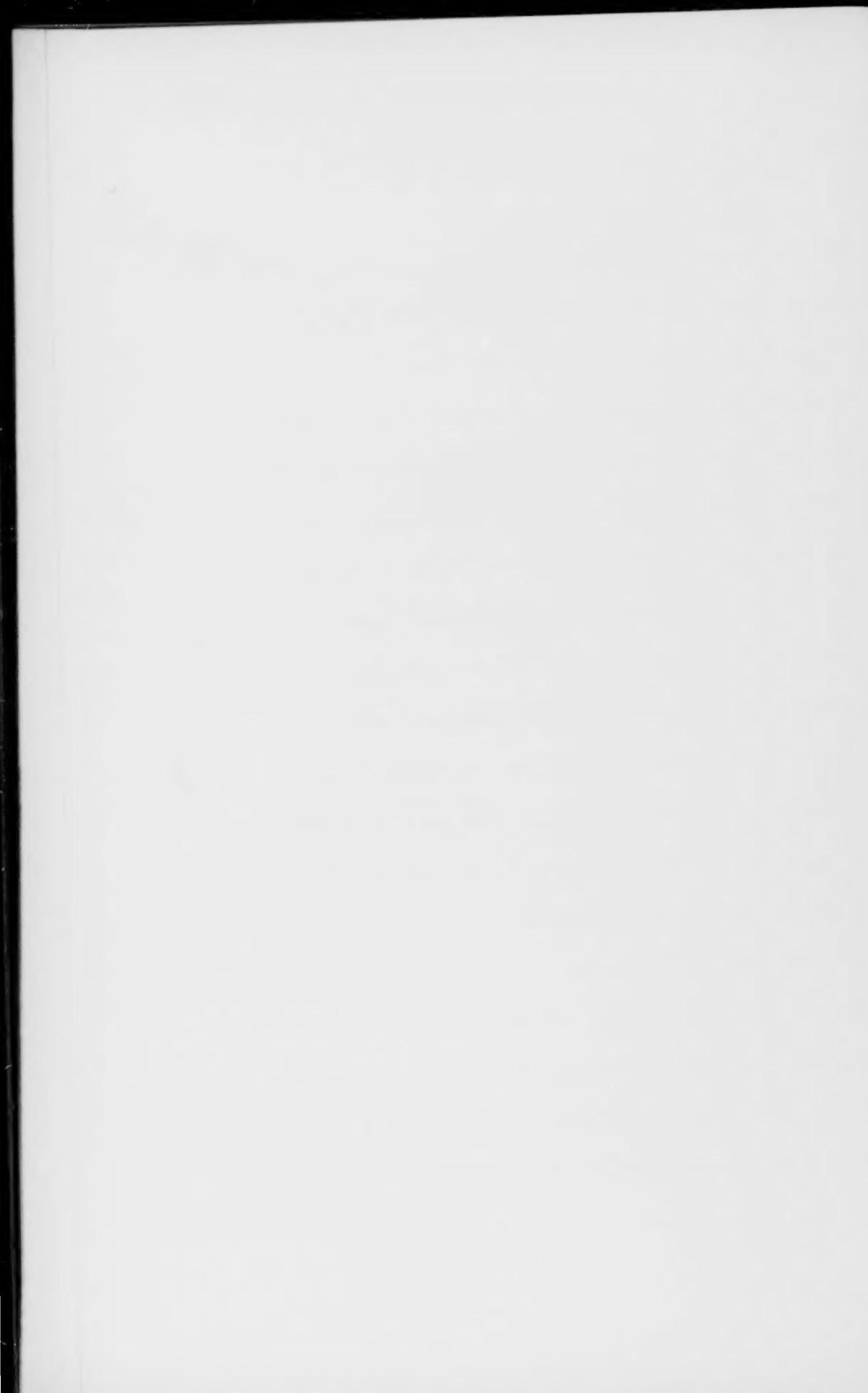
A plan's vesting schedule delineates the timetable by which a participant's benefits will become vested i.e. nonforfeitable. The vesting schedule in the National Shopmen Pension Plan provided that benefits were to be nonforfeitable after 10 years of service. The Trustees contend that because they did not officially change this schedule, the action they took pursuant to §2.09 was not a vesting schedule amendment. However, because the effect of defendants' actions was to alter the vested



benefits of the plaintiffs, the Court holds that these actions do constitute a change in vesting schedule.

563 F.Supp. at 776 (emphasis added). The court quoted with approval from Fentron: "The Fund and its trustees cannot be permitted to do indirectly what would be prohibited if done directly by changing the vesting schedule without changing the vesting provisions of the plan." Fentron, 674 F.2d at 1306. The district court held that the change in benefits was an "amendment" to the vesting schedule, and the plaintiffs were entitled to have their benefits computed under the pre-"amendment" plan--i.e., to receive full credit for their precontributory service.

The district court also read the §203 exemptions in light of another ERISA provision. Section 204(g) provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment



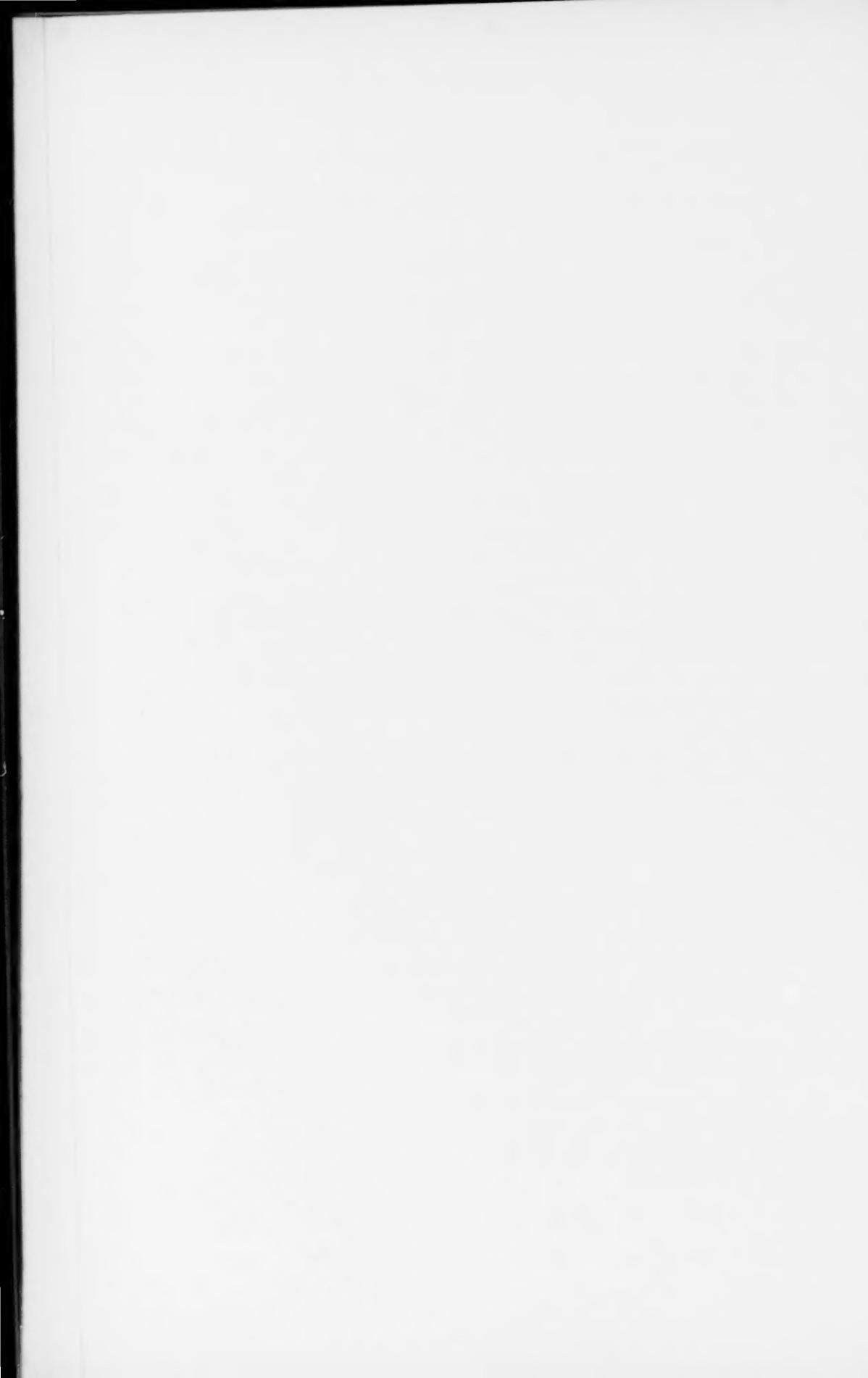
of the plan, other than an amendment described in section [302(c)(8)]."¹⁸ Application of the "amendment" described in §302(c)(8) is specifically limited:

No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary [of Labor] notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section [303(b)]) and that waiver under section [303(a)] is unavailable or inadequate.¹⁹

¹⁸ Id. §1054(g).

¹⁹ Id. §1082(c)(8). In determining whether the fund would face "substantial business hardship," the Secretary may look at whether

- (1) the employer is operating at an economic loss,
- (2) there is substantial unemployment or underemployment in the trade or business and in the industry concerned,



The district court again viewed the benefit reduction resulting from the cancellation of precontributory service credits as an "amendment":

It is indisputable that the Trustees' action here decreased the accrued benefits of all members of the plaintiff class. Further, the Court holds, pursuant to the same reasoning employed to find an amendment in the vesting schedule, that this reduction in benefits was the result of a plan "amendment."

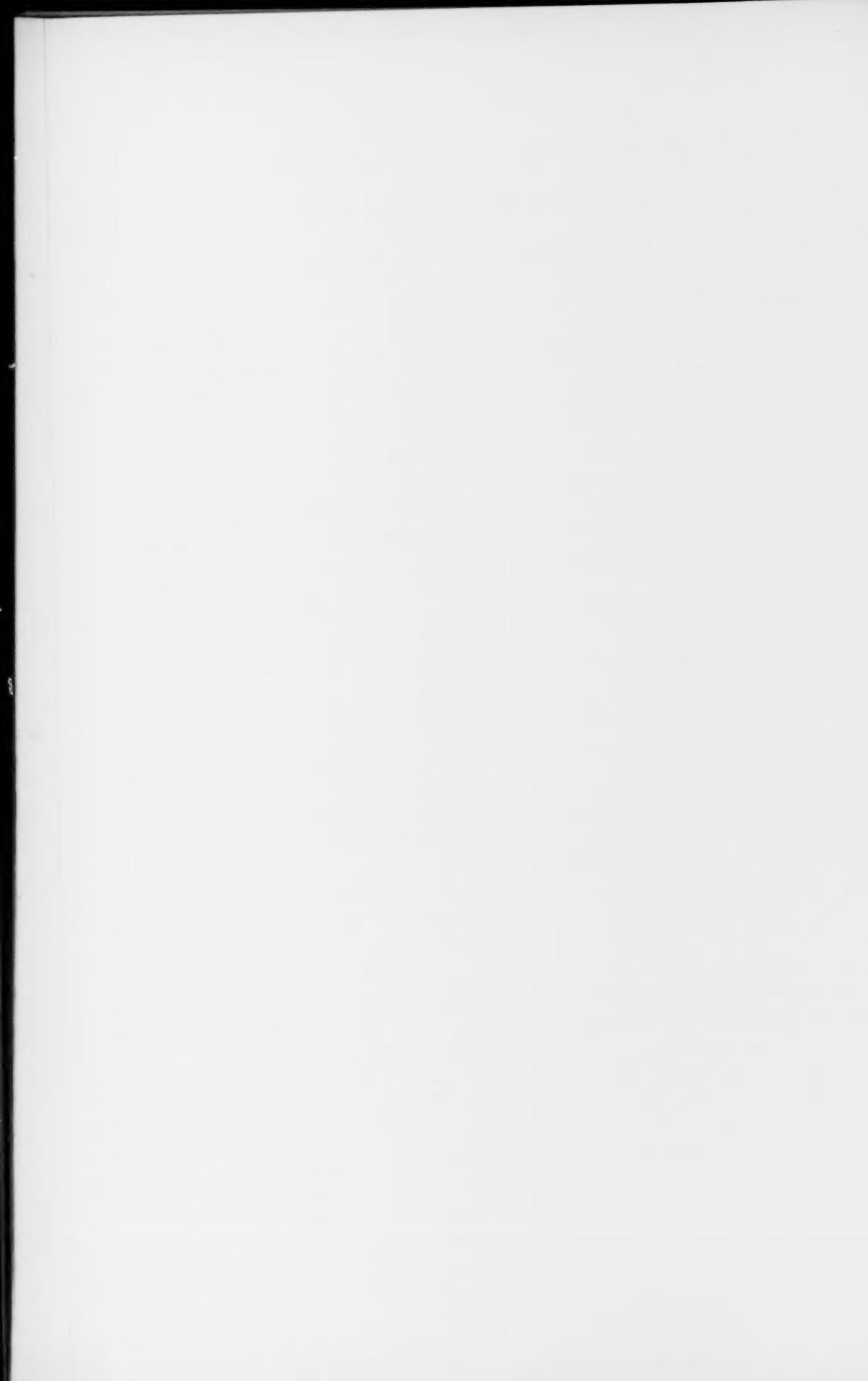
563 F.Supp. at 777 (footnote omitted). Since the trustees never submitted their "amendment" for approval to the Secretary, the

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(3) the sales and profits of the industry concerned are depressed or declining, and

(4) it is reasonable to expect that the plan will be continued only if the waiver is granted.

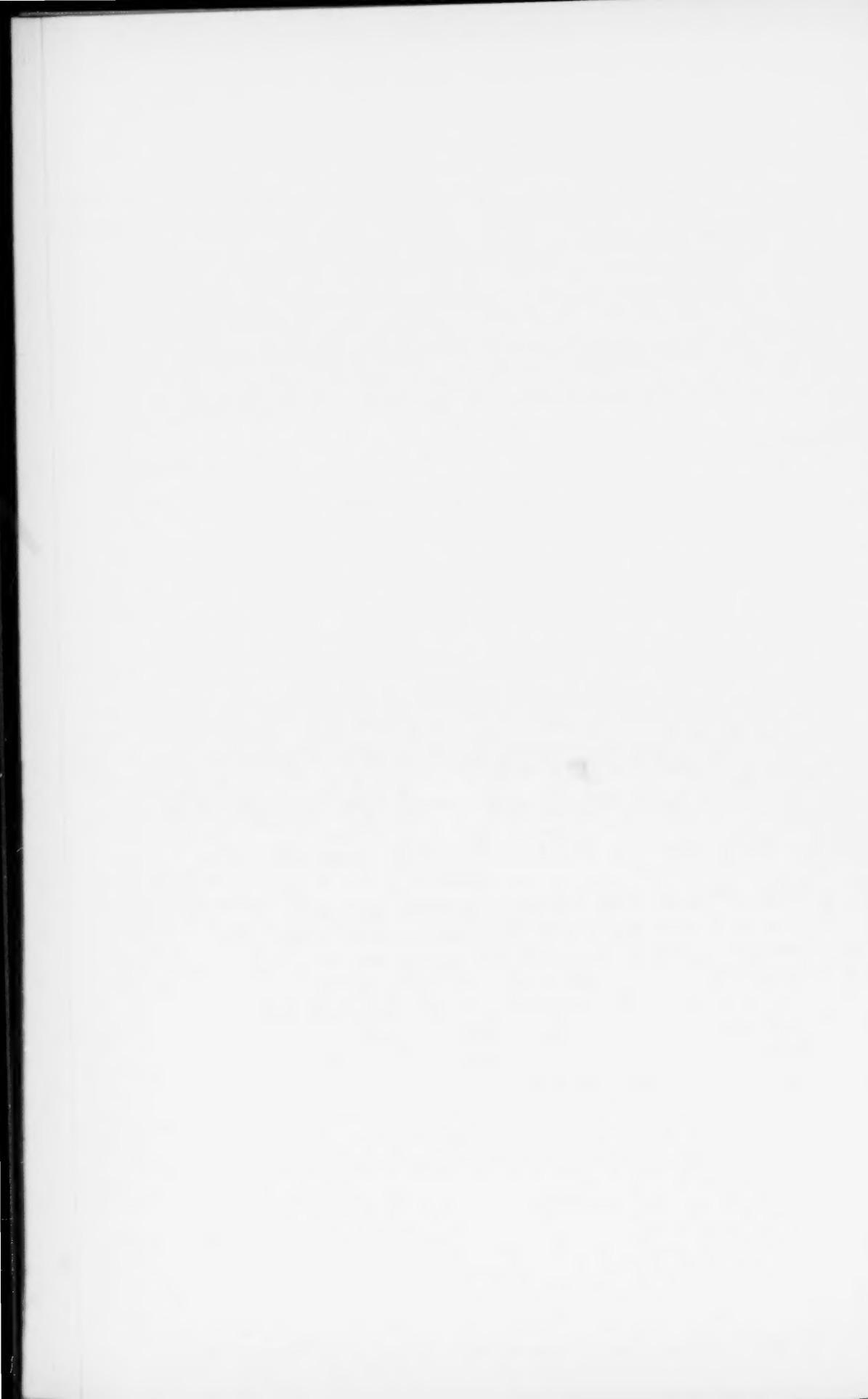
ERISA §303(b), 29 U.S.C. §1083(b) (1982). Under this section, the Secretary can grant permission to amend the benefit amounts only if it is shown that the amendment is necessary to preserve the fund, and if a simple waiver of ERISA's minimum funding standards, ERISA §302, 29 U.S.C. § 1082 (1982), would not solve the fund's problems.



district court held the reduction of credits invalid under §204(g). Just as in its decision under §203(c)(1)(B), the district court's decision under §204(g) depends entirely on its conclusion that any reduction in benefits to pension recipients is a "plan amendment."

The plaintiffs vigorously support this interpretation. They argue that §203(a)(3)(E) is not an unqualified exemption that would allow plan trustees to cancel benefits whenever unfunded liability is present, but rather a substantive provision, which may only be carried out through the procedures outlined in §§203(c)(1)(B) and 204(g):

That ERISA may permit plans not to count past service credits, and may permit plans to cancel past service credits previously provided, does not answer the question of how those cancellations can be effected. . . . Sections 203(c)(1)(B) and 204(g) speak to that issue, and establish precise guidelines which must be followed when trustees seek to effect certain substantive changes.



Brief of Appellees at 25. The plaintiffs' basic position is that the exemptions listed in §203(a)(3)--at least, the exemption in subsection (a)(3)(E)--can be exercised only if (1) plan participants are given a choice as to whether they are willing to have their benefits cut, and (2) the Secretary of Labor determines that such cuts are necessary for the survival of the plan. It is clear that the plaintiffs' interpretation would severely circumscribe the ability of a multiemployer fund to cancel such credits, since it is likely that only the benefits of those employees with less than 5 years of service could ever be affected,²⁰ and then only if

²⁰ While employees under these circumstances might (at least conceivably) choose to receive benefits based on the post- "amendment" plan, it is difficult to imagine that rational employees would voluntarily give up their precontributory service credits and accept lower benefits. It seems safe to say that affected employees with 5 or more years of service would almost invariably

(cont.)



necessary to save the Fund from serious financial jeopardy.

For several reasons, we reject the plaintiffs' construction of these provisions.

B.

We begin by examining the plain language of the provisions in question. Not infrequently, the best guide to what a statute means is what it says. The plaintiffs' construction of §§203(c)(1)(B) and 204(g) does violence to the plain language of both sections. Section 203(c)(1)(B) applies only to "plan amendment[s] changing any vesting schedule"; §204(g) applies only to "amendment[s] of the plan." In both sections, the word "amendment" is used as a word of limitation. Congress did not state that any change

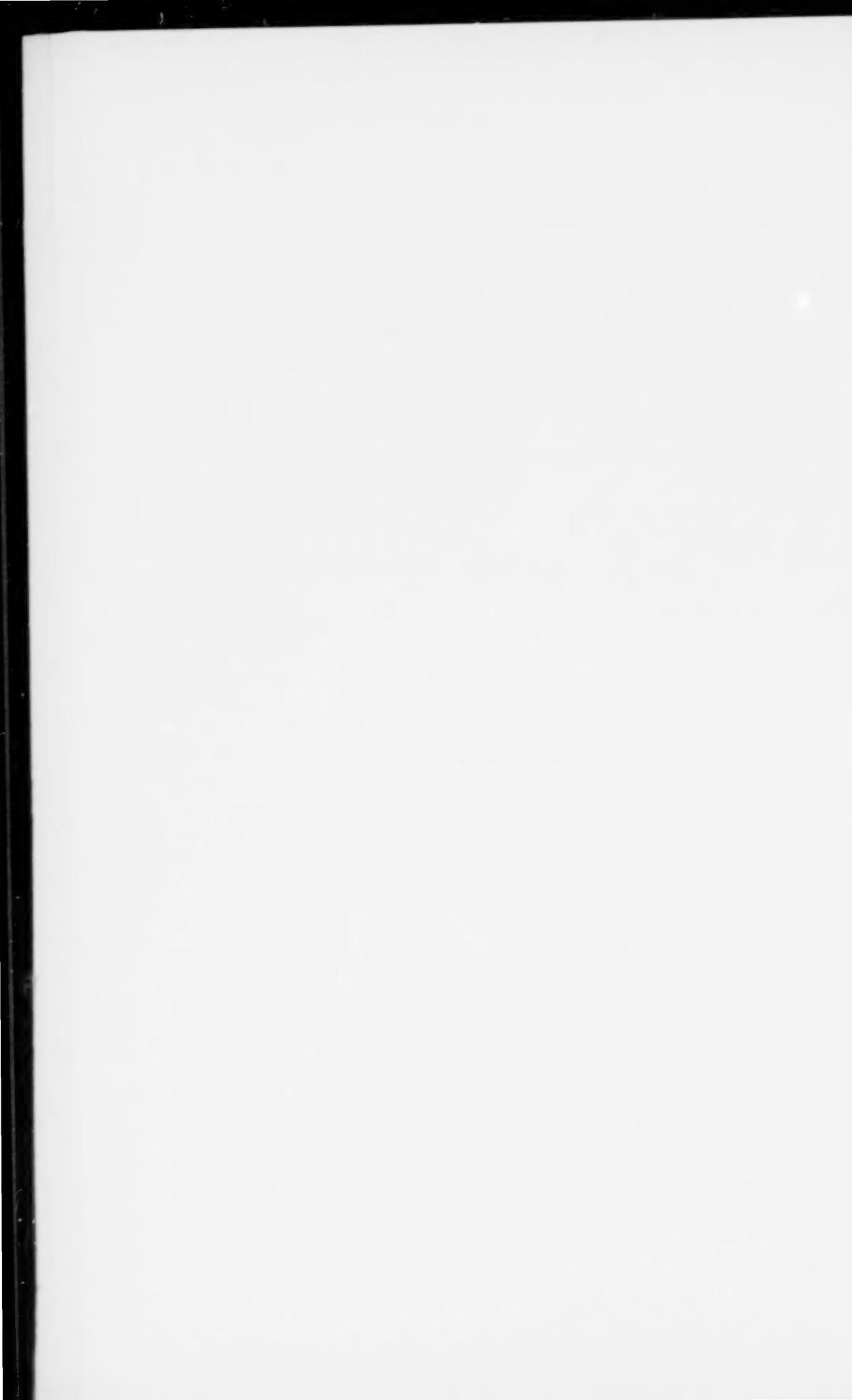
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choose to keep their precontributory service credits, and that hence only the most minor benefit reductions would ever be made, regardless of the necessity involved.



would trigger the two provisions; it stated that any change by amendment would do so. The district court found, and the plaintiffs admit, that there was no "amendment" to the plan in the "technical" sense--i.e., an actual change in the provisions of the plan. True. All that happened was that §2.09, a provision already incorporated into the plan, was applied. Actions authorized by the plan were carried out by the persons authorized to do so.

The plaintiffs' construction would stretch the term "amendment" nearly to the breaking point. Under their construction, reducing any benefits, authorized by the plan, of persons whose rights are vested, would constitute an "amendment." While speculation regarding why Congress chooses specific language is not always fruitful, it should be noted that had Congress meant either subsection to apply to "any reduction



in benefits to vested participants," it could easily have said so. The phrases it chose, "[a] plan amendment" which "decrease[s]" benefits or "chang[es] any vesting schedule," are curious ways of saying "any reduction in benefits." A resort to the legislative history does not help the plaintiffs' argument. Nothing in the history lends any credence to the construction they advocate; what history there is, though not particularly helpful, is consistent with the clear language of the subsection.²¹

²¹ Subsection (a)(3)(E) was added to the remainder of (a)(3) in the 1980 ERISA Amendments. See 94 Stat. 1208, 1292 (1980). The various legislative materials relating to the Amendments discuss §203(a)(3)(E). The Report of the House Education and Labor Committee on the 1980 ERISA Amendments stated that "a multiemployer plan may, upon withdrawal of an employer, eliminate benefits granted for service before the employer joined the plan." H.R. Rep. No. 869, 96th Cong., 2d Sess. 115 (1980). At the same time that ERISA was amended, the Internal Revenue Code was amended to conform it to (cont.)



But we do not simply rely on the plain language of particular subsections in interpreting this statute. As the Supreme Court has noted, ERISA is a "comprehensive and

21 (cont.)

the changes in ERISA. The language of 26 U.S.C. § 411(a)(3)(E) (1982), which is identical to ERISA § 203(a)(3)(E), was discussed in the Report of the House Ways and Means Committee:

Under the bill, a multiemployer plan does not fail to meet the vesting requirements of ERISA merely because the plan provides for the forfeiture of accrued benefits attributable to service with a participant's employer before the employer was required to contribute to the plan in the event that the employer ceases making contributions to the plan.

H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 73 (1980). In neither report is this right qualified by reference to any limitations in §§203(c)(1)(B) or 204(g). Since, as noted above, such a limitation would have curtailed drastically the usefulness of subsection (a)(3)(E), that omission is suggestive. It is also significant that the provision in subsection (a)(3)(E) was put in (a)(3), which provides for routine cancellations like death and reemployment. Nothing in the legislative history of those other exceptions to the general vesting rules indicates that Congress intended to have §§203(c)(1)(B) or 204(g) apply.



reticulated statute," Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980), and each interrelated provision must be read in conjunction with other provisions to determine its meaning. It is important to read each section of this complex statute in its proper context. Analyzing §§203(c)(1)(B) and 204(g) in light of the remainder of ERISA also indicates that the construction of the two sections advocated by the plaintiffs is incorrect.

To begin with, the plaintiffs fail to distinguish between the concepts of "vested rights" and "accrued benefits," a distinction drawn by Congress in writing the statute. The two principles are related, but different. An employee is "vested" in a portion of his benefit when he has a nonforfeitable²²

²²The statutory definition of "nonforfeitable" is provided in ERISA § 2(19):
(cont.)



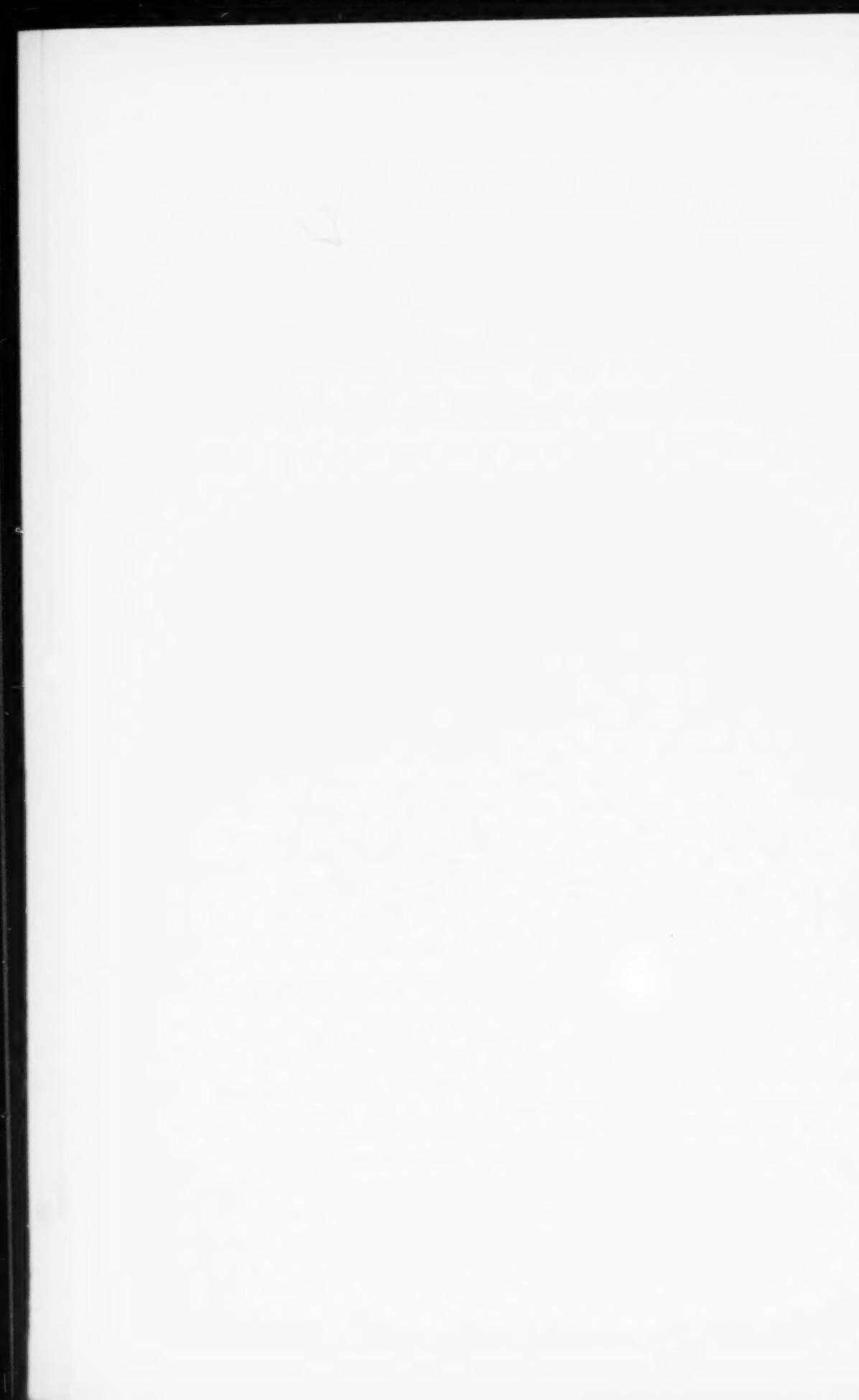
right to a given percentage of his accrued benefit.²³ The "vesting schedule" specifies the time at which an employee obtains his nonforfeitable right to a particular percentage of his accrued benefits. It does not provide any formula or schedule for determining the amount of the accrued benefit.

22 (cont.)

The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section [203(a)(3)].

29 U.S.C § 1002(19) (1982) (emphasis added).

23 "The term 'accrued benefit' means-(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age" Id. §1002(23).



Thus, "vesting" governs when an employee has a right to a pension; "accrued benefit" is used in calculating the amount of the benefit to which the employee is entitled. The distinction between the two terms was recognized by the Supreme Court in Nachman, supra:

[T]he term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in §203 (a)(3) . . . describes an event--such as death or temporary re-employment--that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect.

446 U.S. at 372-73 (emphasis added). In its subsequent decision in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), the Court reemphasized the difference:

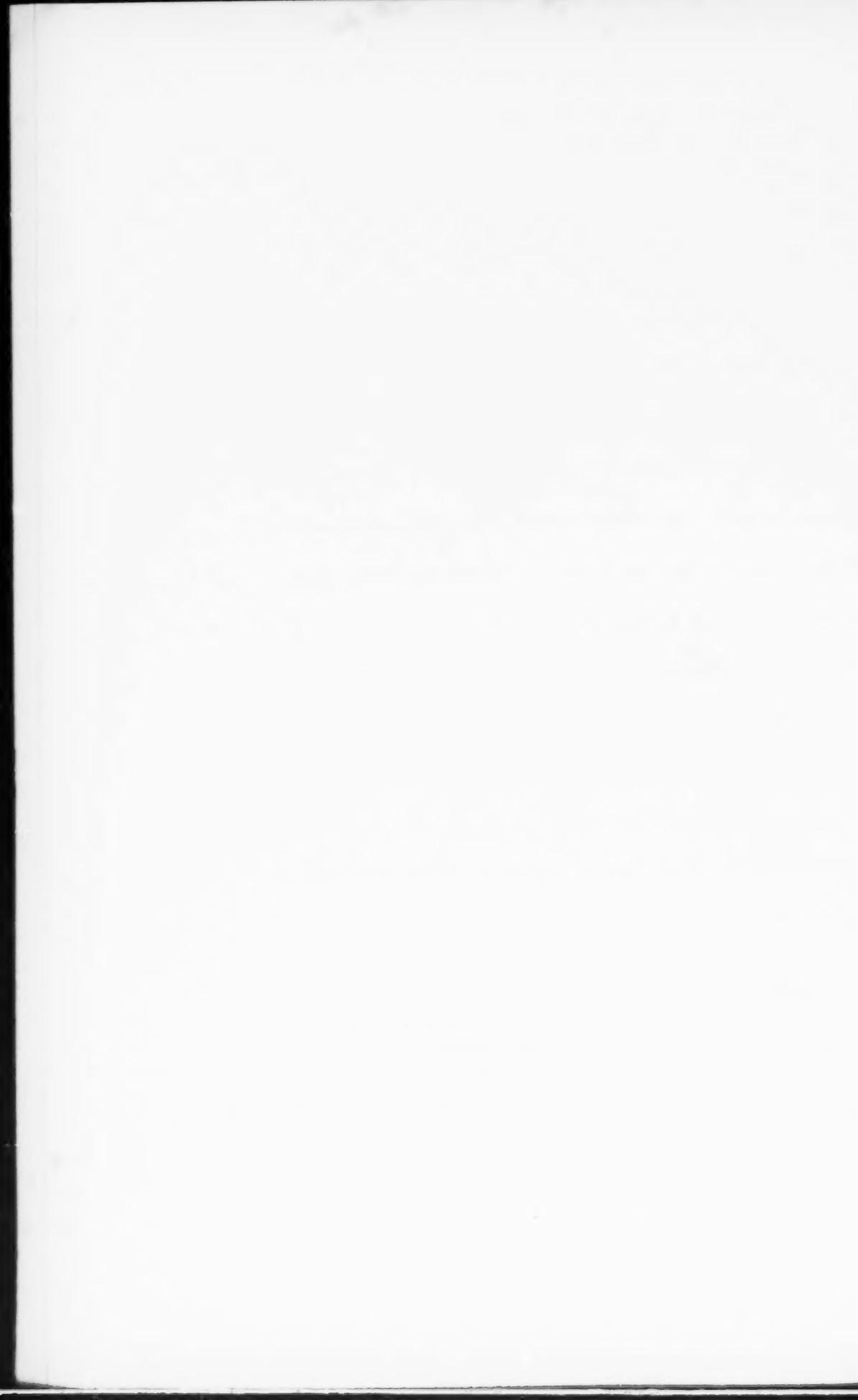
[T]he statutory definition of "nonforfeitable" assures that an employee's



claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit. As we explained last Term, "it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan.'"

Id. at 512 (emphasis added) (quoting Nachman, supra, 446 U.S. at 371). Under the ERISA scheme, a reduction in benefits to employees whose right to a pension in some amount remains vested is not a "forfeiture." A reduction in accrued benefits, standing alone, does not affect the right to obtain benefits and thus does not affect vesting. It changes only the amount of benefits a pensioner receives, not his vested status. It cannot be construed as an amendment to the vesting schedule.²⁴

²⁴ Some of the language in Fentron might be construed to imply that cancellation of credits resulting in reduced benefits are forfeitures prohibited by ERISA: "Unlike the credits of vested employees, ERISA does not (cont.)

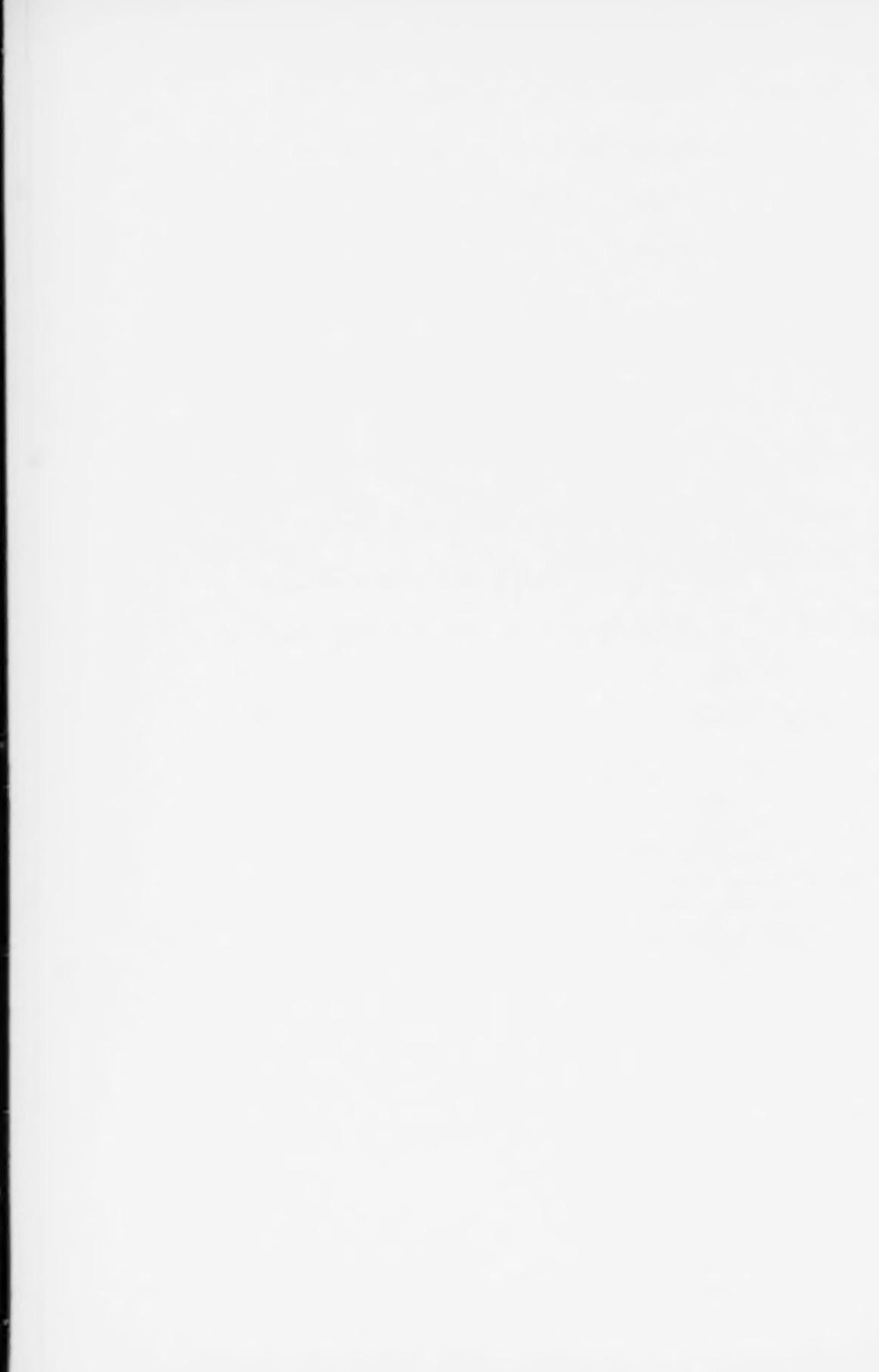


Section 203(c)(1)(B) is specifically limited to amendments to the vesting schedule. It does not purport to govern all reductions in accrued benefits. Since the reduction in accrued benefits involved in this case does not affect the vested status of any employees, §203(c)(1)(B) does not require that employees be offered a choice in benefits calculations.

Unlike §203(c)(1)(B), §204(g) is not limited to vesting schedule amendments. It does apply to amendments which affect only

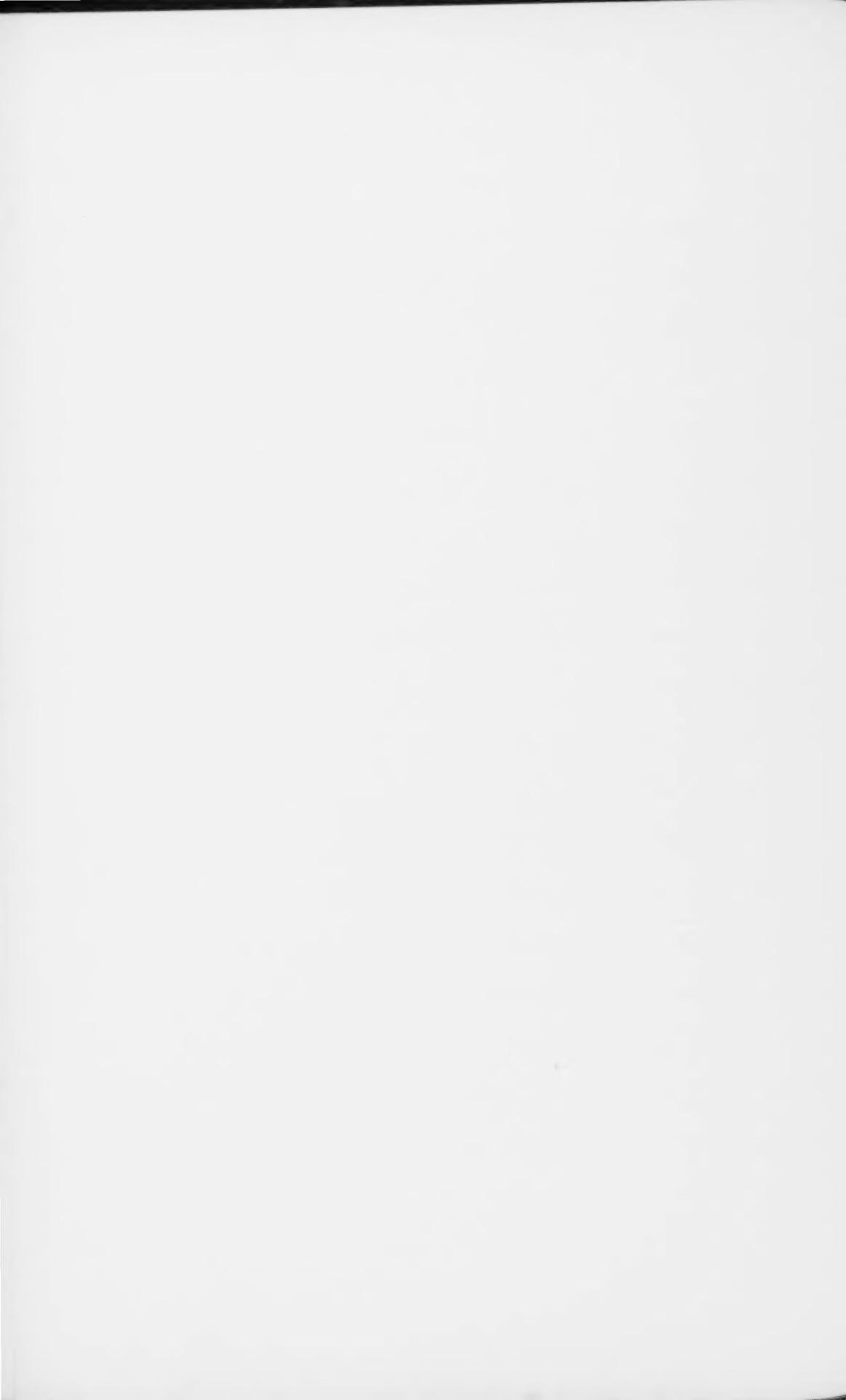
24 (cont.)

prohibit the cancellation of Past Service Credits of employees not yet vested under a pension plan." 674 F.2d at 1306 (emphasis added). However, Fentron is a case where, as other language in the opinion points out, all of the employees involved were actually completely divested. Without expressing any opinion on the issue, we assume for purposes of this discussion that the Fentron court was correct in holding that such complete divestiture brought about by implementation of a plan provision is, in effect, an amendment to the vesting schedule. We reject any broader interpretation of the Fentron holding.



accrued benefits. But §204(g) does not apply to every reduction in benefits. Congress did not provide: "The accrued benefit of a participant under a plan may not be decreased except as prescribed in section 302(c)(8)." Instead, it provided: "The accrued benefit of participant under a plan may not be decreased by an amendment of the plan, other than an amendment prescribed in section [302(c)(8)]" (emphasis added). The plaintiffs' argument that any reduction in benefits should be considered a plan amendment would require us to ignore the italicized language in the section. . .

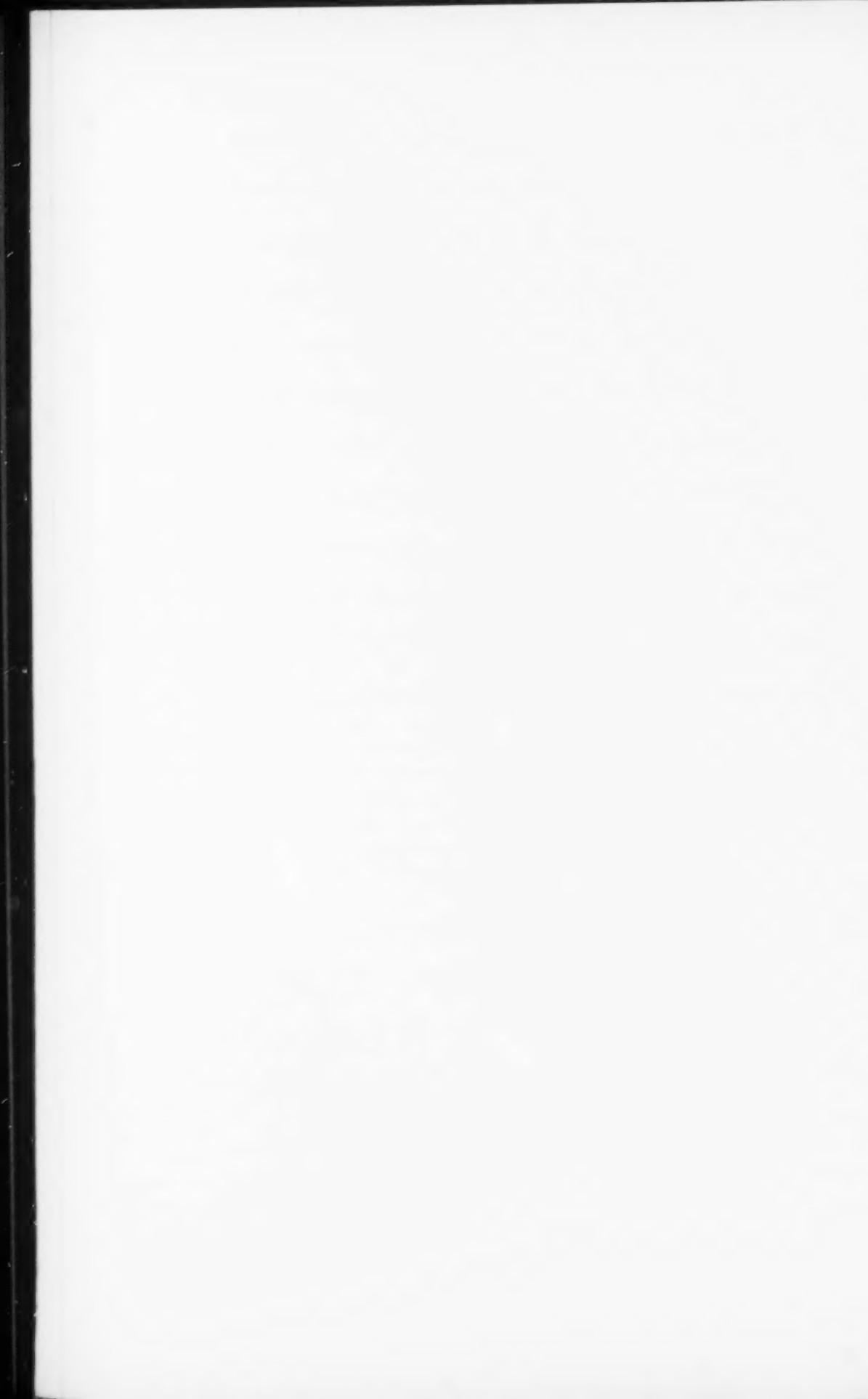
The language is not surplusage. The reason for the limitation is apparent, and is entirely consistent with the remainder of the statutory scheme. Congress's chief purpose in enacting ERISA was to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement--



and if he has fulfilled whatever conditions are required to obtain a vested benefit--he actually will receive it." Nachman, supra, 446 U.S. at 375. Plan trustees have fiduciary duties not only to persons like Stewart and Warren, who have retired, but to those who are now paying into the fund and will receive their promised benefits in the future. The trustees' twin obligations--distributing benefits while protecting the fund--must be balanced:

The trustees of a pension plan have a fiduciary duty to preserve the financial security of a pension fund and to apply the assets of the fund for the benefit of the employees to the greatest extent possible. We recognize that these respective obligations are often conflicting.

Adams v. New Jersey Brewery Employees' Pension Trust Fund, 670 F.2d 387, 397 (3d Cir. 1982) (footnote omitted). To give trustees the flexibility necessary for efficient operation of pension funds, Congress has recognized and provided for



several situations in which plans can reduce or eliminate benefits to participants by implementing preexisting plan provisions.²⁵ If Congress had drafted §204(g) the way the plaintiffs would have us construe it, the subsection would have restricted severely the ability of the trustees to protect the fund in routine situations. In its present form, §204(g) is specifically limited to actual amendments, not otherwise approved by ERISA, which would change benefit amounts. As such, it is entirely consistent with the remainder of ERISA.

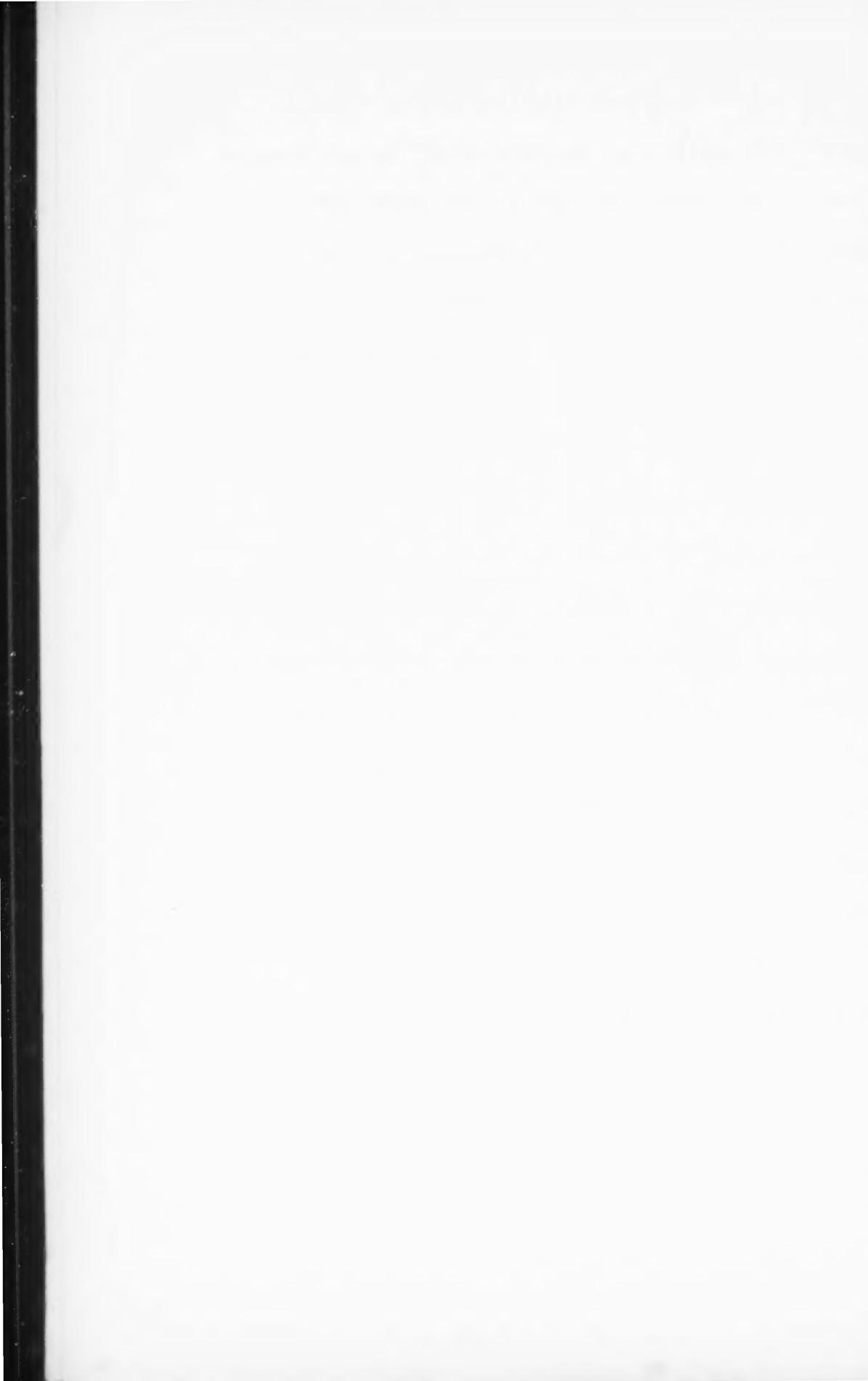
Our interpretation also is consistent with the apparent interpretations made by

²⁵ See, e.g., ERISA §§203(a)(3)(A) (death of plan participant); 203(a)(3)(B) (reemployment of plan participant); 204(b)(1)(iv), 204(b)(1)(G) (integration of other retirement benefits); Alessi, supra, 451 U.S. at 516-17 (offset of money collected under workers' compensation). See also 29 U.S.C. §1426 (1982) (benefit reductions for insolvent plans).



the agencies charged with administering ERISA, and with the decisions of other courts which have faced the issue. It does not appear that either the Secretary of Labor (whose approval the plaintiffs claim is vital to Congress's statutory scheme) or the Internal Revenue Service (which is charged with approving or disapproving plans for tax purposes) has challenged the Fund's action in this case. Neither the Secretary nor the Commissioner is claiming that §§203(c)(1)(B) and 204(g) apply to any of the nonforfeitzability exceptions under §203(a)(3). The Secretary has not indicated that he believes that it is his duty to evaluate and approve benefit reductions made under provisions such as §2.09 of the plan.

The Internal Revenue Service has not denied favorable tax treatment to plans which include or exercise precontributory service cancellation clauses. The I.R.S does



not treat a benefit as forfeitable

merely because an employee's accrued benefit which results from service with an employer before such employee was required to contribute to the plan is forfeitable on account of the cessation of contributions by the employer of the employee.

26 C.F.R. §1.4111(a)-4(b)(5)(1983).²⁶ Examples provided in the regulations discuss the limitations on cancellations of pre-contributory service, and they do not suggest that §§203(c)(1)(B) and 204(g) are applicable.²⁷

²⁶ This regulation was promulgated under the original version of 26 U.S.C. §411(a) (1976), prior to enactment of the 1980 ERISA Amendments which added id. §411(a)(3)(E) and its counterpart, ERISA §203(a)(3)(E), but it continues without change.

²⁷ In 26 C.F.R. §1.414(f)-1 (1983), an example is given of how a multiemployer plan could properly reduce precontributory service credits without violating ERISA. In the example, the Service would permit cancellation of precontributory service credits for an employee who had 15 years of precontributory service and 15 years of contributory service, if his employer withdrew from the plan. The I.R.S. found that the plan would not violate

(cont.)



The courts have also interpreted the statute in this manner. In Alessi, supra, the Supreme Court considered pension plan provisions which permitted the fund in question to reduce benefits to a participant by the amount of workers' compensation received by the participants. Just as in this case, the effect of the fund's action in Alessi was to reduce benefits to vested participants, so this would have been--under the plaintiffs'

27 (cont.)

ERISA so long as benefits for contributory service are not forfeited:

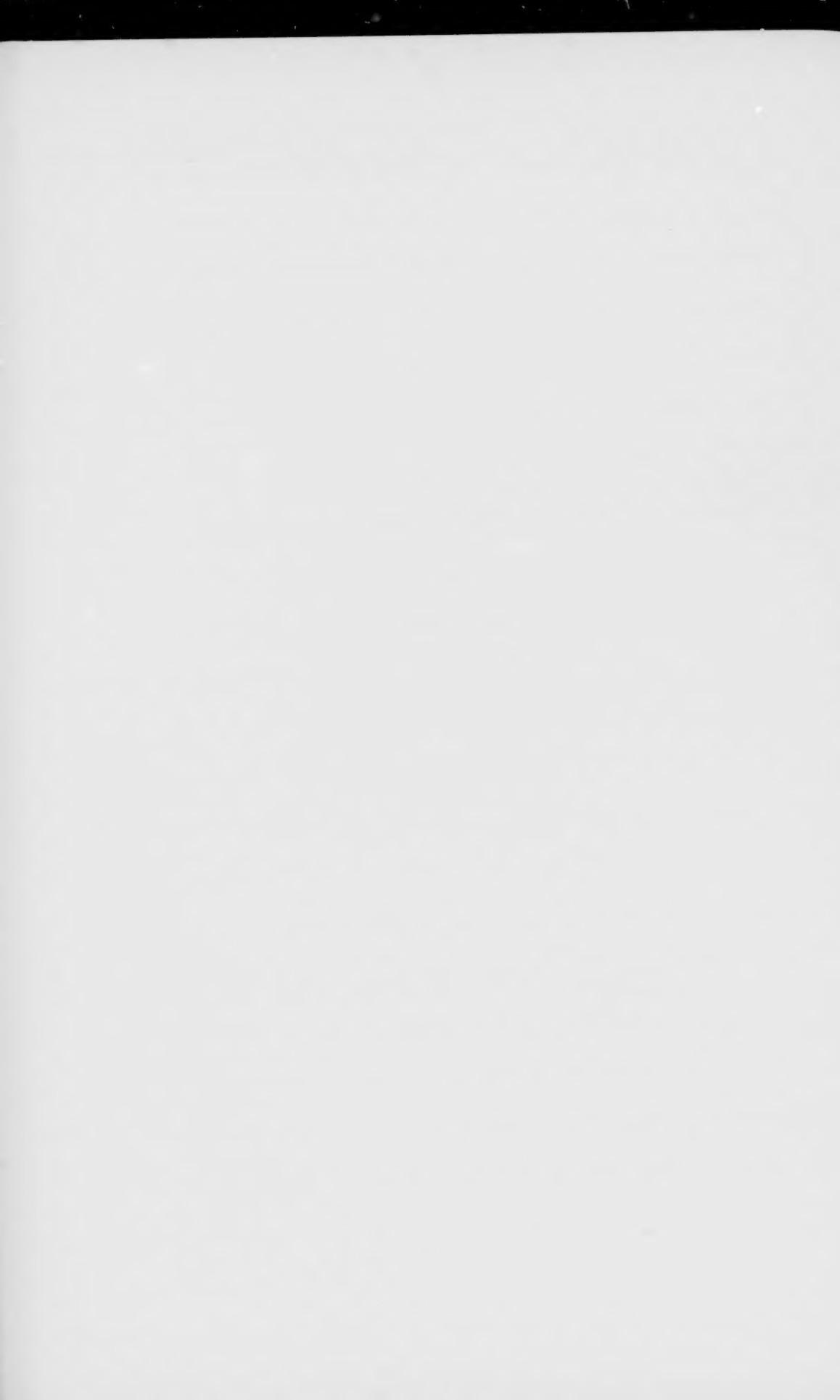
[I]n order for the plan to meet the [nonforfeitability] requirements. . . . the plan must provide for [the employee's] accrued benefit after [the employer] ceased to be a member of the plan to be at least. . . [the employee's] total accrued benefit less . . . benefit accrued for service prior to [the employer's] membership in the plan.

Id. §1.414(f)-1(b)(2)(ii) (emphasis added). The regulation does not indicate that, as an additional requirement the employer must comply with the provisions of ERISA relied upon by the plaintiffs. This is an interpretation of the statute that is entitled to considerable force.



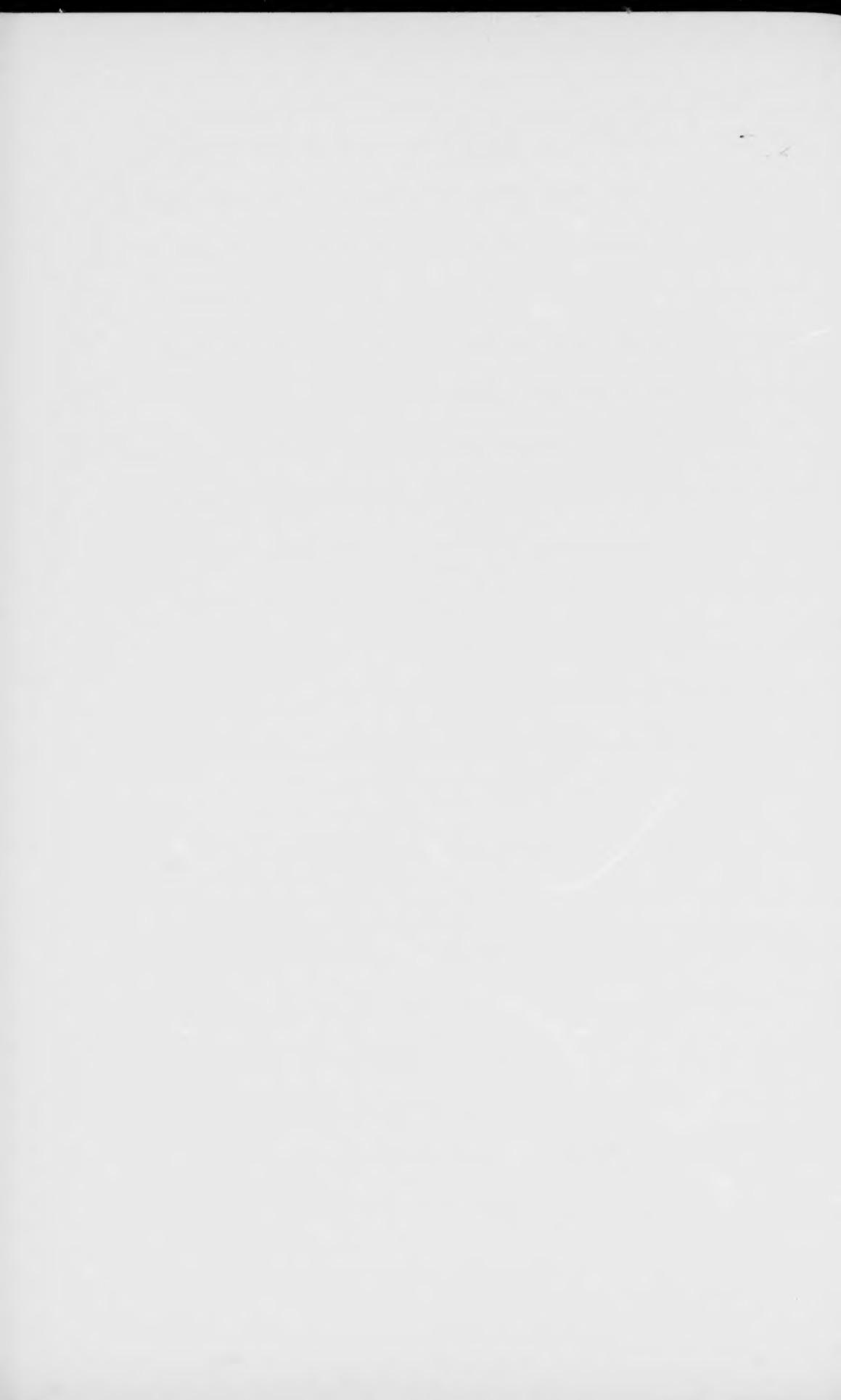
theory--an "amendment" to the plan. The participants in Alessi were not given the chance to keep their pre-"amendment" benefit amounts, nor was the benefit reduction presented to the Secretary of Labor for his approval. But the unanimous Supreme Court held that the fund's action in reducing the benefits did not violate ERISA. Alessi, 451 U.S. at 516-17.

In Harm v. Bay Area Pipe Trades Pension Plan Trust Fund, 701 F.2d 1301 (9th Cir. 1983), a pension plan enforced its rule cutting off benefits to a retired worker who took new employment. Under the plaintiffs' theory, this too would be an "amendment" which decreased benefits to an individual whose rights were vested under the plan. Authority to curtail benefits upon reemployment--like authority to cancel precontibutory service credits--is found in ERISA §203(a)(3). Like the plaintiffs in this case and in Alessi,



the participant in Harm was not given the option to take his pre-"amendment" benefits, and the Secretary of Labor did not review the fund's decision. Nevertheless, the court held that the fund's denial of benefits was proper. 701 F.2d at 1305-06.

Other courts have construed ERISA to permit cancellation of precontributory service when necessary to avoid the dumping of unfunded liability, without suggesting that §§203(c)(1)(B) and 204(g) were implicated. In Central Tool, supra, the district court invalidated the benefit cancellation at issue, but on the ground that the fund had not demonstrated that such cancellation was necessary to avoid the dumping of unfunded liability. The court found "unexceptionable" the goal of "protect[ing] the fund from the dumping of liability as a result of an employer's termination of participation after past service credits have been granted to



its employees." Central Tool, 523 F.Supp.

at 816. The court concluded:

It remains for the Court to attempt to harmonize the vested status of plaintiff's employees with achievement of defendants' legitimate objective of preserving the fund from unfunded liability. The controlling guideline for effecting this reconciliation is to validate the provision to the maximum extent possible consistently with the constraint that the provisions not cause a divestment of any vested employee. This objective is best achieved by allowing the forfeiture of past service credit, pursuant to the provisions, for benefit accrual purposes, but not for the purpose of determining vested status.

Id. at 818 (footnotes omitted).²⁸

²⁸ See also Baltimore Rebuilders, Inc. v. NLRB, 611 F.2d 1372, 1379-80 (4th Cir. 1979), cert denied, 447 U.S. 922 (1980):

We think the challenged provisions [permitting cancellation of precontributory service] evidence an intention to encourage the voluntary continuation of pension coverage on a unit-wide basis. As such, they serve a legitimate business purpose of the Fund to reasonably limit an unfunded liability

. . . .
In all, we think automatic cancellation of the credits when contributions cease is a reasonable plan

(cont.)



Similarly, the Ninth Circuit in Elser, supra, noting that it "agree[d]" with the holding in Central Tool, found the fund's cancellation of credits to be arbitrary and capricious--the fund presented no evidence of any actuarial reason for its actions--but did not apply §§203(c)(1)(B) and 204(g) to impose additional procedural requirements.

The court, after quoting Central Tool on the importance of avoiding unfunded liability, noted that precontributory service could be cancelled to the extent "necessary or reasonable to protect the financial stability of the fund." Elser, 684 F.2d at 658.²⁹

28 (cont.)

provision which operates fairly to induce the voluntary continuation of pension coverage.

²⁹ The Elser court did not discuss the language in the Fentron decision suggesting that the two subsections would apply in this situation, see note 24 supra, but the Elser court was fully aware of its earlier decision. Since Elser addressed cancellations like those in this case, while Fentron involved cancellations that divested participants,

(cont.)



Finally, the weakness of the plaintiffs' interpretation is demonstrated by its logical consequences. Since the right to cancel pre-contributory service credits is included in the list of exceptions in §203(a)(3), the plaintiffs must necessarily maintain that powers granted under that section may only be exercised if §§203(c)(1)(B) and 204(g) are complied with.³⁰ Under the plaintiffs' theory, for example, a pension fund

29 (cont.)

we believe that our interpretation is fully consistent with that of the Ninth Circuit on this issue. Our interpretation of Elser and Fentron is also consistent with the Ninth Circuit's decision in Harm, supra, involving another §203(a)(3) exception.

³⁰ Perhaps recognizing the absurdity of this position, the plaintiffs avoid suggesting that the other §203(a)(3) exceptions are also governed by the procedures in §§203(c)(1)(B) and 204(g). But they offer no rational basis for treating subsection (a)(3)(E) differently from the other exceptions in subsection (a)(3). To the extent that the plaintiffs argue that a decrease in benefits to vested employees is a plan amendment, we see no reasonable basis for distinguishing them.



would have the right to cancel benefits paid to a participant with 5 or more years of service when that participant dies, §203(a) (3)(A)--but only if (1) the dead participant (or, perhaps, his estate) is given the right to elect to continue receiving full benefits, and (2) the Secretary of Labor finds that the cancellation is necessary to assure the financial soundness of the pension fund. There is no evidence that Congress intended such an unreasonable result.

From our review of the provisions of ERISA and the applicable authorities, we conclude that actions which are specifically permitted by ERISA §203(a)(3), and which are carried out under authority reserved by the pension plan without actual amendment of the plan, are not subject to the procedures



outlined in §§203(c)(1)(B) and 204(g).³¹

IV.

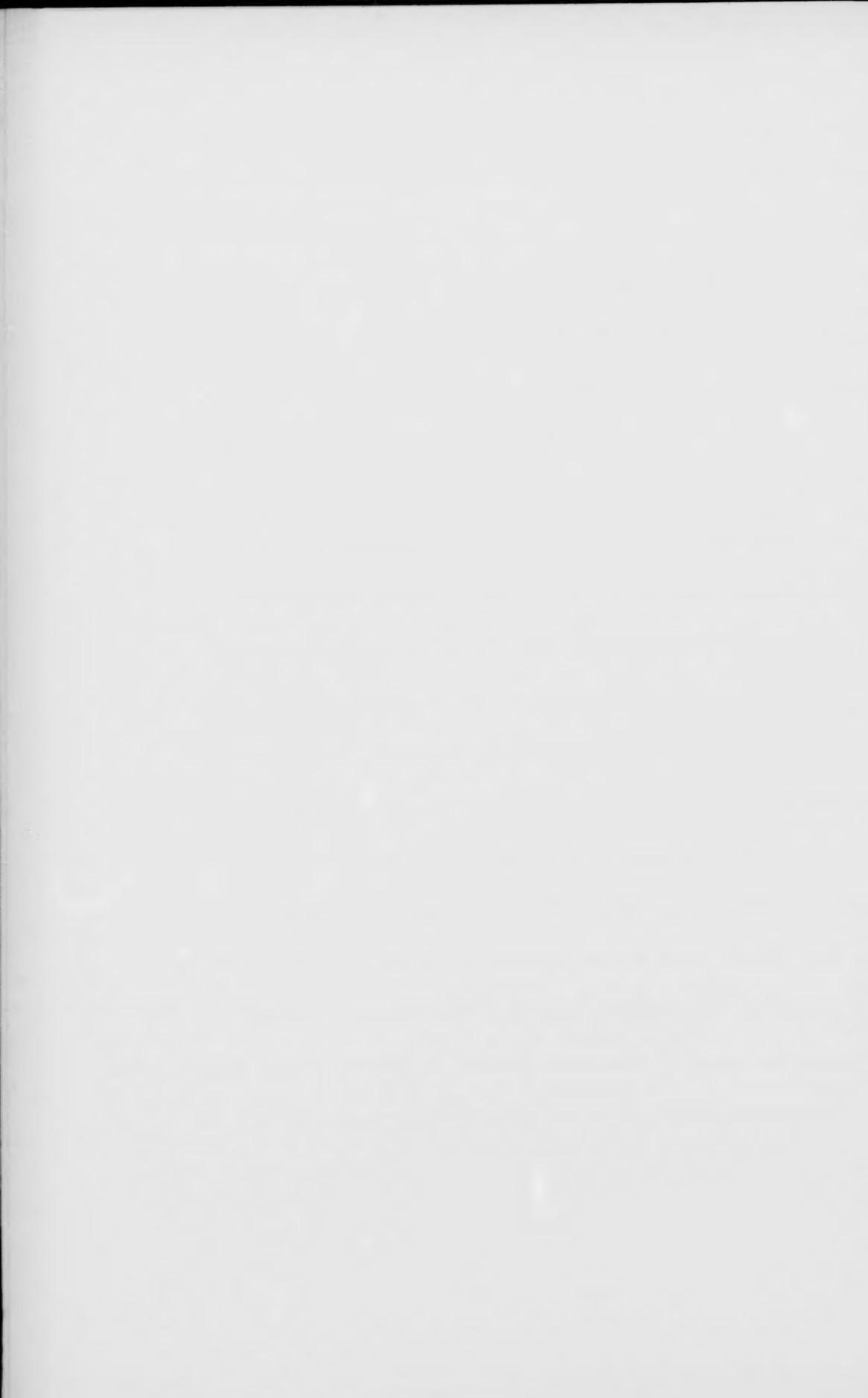
Our conclusion does not dispose of this litigation. It has been held that cancellations of precontributory service, while permissible, are nevertheless subject to review to ensure that the trustees did not act in an arbitrary and capricious manner in cancelling benefits. Elser, supra, 684 F.2d at

³¹To some extent, the unfunded liability problems that pension funds face have been eased by the 1980 ERISA Amendments, which permit pension funds to recover unfunded liability directly from withdrawing employers. (The present case is not covered by these amendments, since Anchor withdrew in 1979.) It is true that the new provisions make it "significantly less likely that forfeiture provisions. . . will be invoked." Brief for Appellants at 46. But these provisions are useful only to the extent that the withdrawing employer has sufficient assets to cover the unfunded liability. If an employer is insolvent--and insolvency is, of course, a common reason for withdrawing from a fund--the pension fund will be in the same position as the Fund in this case. Thus, there will certainly be situations, even under the new provisions, where unfunded liability can be minimized only through cancellation of precontributory service credits.



658; Central Tool, 523 F.Supp. at 816 . The plaintiffs argued in the alternative in the district court that the trustees acted arbitrarily and capriciously in cancelling the precontributory service credits of Anchor employees. The district court, which decided the case on the basis of §§203(c)(1)(B) and 204(g), did not reach this contention. At oral argument, the Fund's representatives conceded that the case should be remanded to consider whether the Fund's cancellation of credits was arbitrary or capricious.

We note, however, that avoiding the dumping of unfunded liability is a permissible goal of multiemployer pension funds. When a fund is obligated to pay out more money than has been paid in, and it is unable to recoup the difference, "[t]hese excess benefits would have to come largely from the stepped-up contributions of current participants." Harm, supra, 701 F.2d at 1305. Thus,



to the extent that cancellation is necessary to avoid the dumping of substantial unfunded liability, it is presumptively reasonable. On remand, the district court should evaluate the evidence to determine whether there was a reasonable actuarial basis for the action of the trustees.³²

³² The plaintiffs also argued in the alternative that the cancellation of service credits violated other provisions of the plan itself. They rely on §7.09 of the plan:

The benefits to which a Participant is entitled under the terms of this plan upon his attainment of Normal Retirement Age are Vested (nonforfeitable), subject, however, to retroactive amendment made within the limitations of Section 411(a)(3)(C) of the Internal Revenue Code and Section 302(c)(8) of ERISA.

(J.A. 193) (emphasis added). The plaintiffs argue that "once the participant has become eligible for a certain amount of benefits, the Trustees cannot unilaterally forfeit any of those benefits without violating [the plan's] nonforfeitarility provision" (J.A. 301). But cancellations of precontributory service credits upon employer withdrawal do not violate ERISA's nonfor-
(cont.)

V.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.³³

Judgment accordingly.

31 (cont.)

feitability provisions, and the plan specifically provides for cancellation of such credits when an employer withdraws. Section 7.09 provides that only benefits to which a participant is "entitled under the terms of [the] plan" are nonforfeitable. Since §2.09 specifically removes the entitlement of participants to benefits for precontributory service with a withdrawing employer, participants are not "entitled" to those benefits under the plan. There is no violation of the plan's nonforfeitability provision.

³³ Since we decide that §§203(c)(1)(B) and 204(g) do not apply at all to benefit accrual changes made under the procedures outlined in §203(a)(3), we do not reach the district court's holding that the protections of §203(c)(1)(B) do not generally apply to persons who retired before January 1, 1976, but that §204(g) does apply to such persons. Stewart, 563 F.2d at 777.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE STEWART, et al., :
Plaintiffs, : C.A. No. 82-3055
v. : FILED
NATIONAL SHOPMEN PENSION FUND, et al., : MAY 20 1983
Defendants. : Clerk, U.S.
DISTRICT COURT
DISTRICT OF
COLUMBIA

APPEARANCES

Burton Fretz, Gill Deford and Neal S. Dudovitz of the National Senior Citizens Law Center and Sharon Guida of Steinberg, Schlachman, Potler, Belsky & Weiner with whom Luther Blackiston of Legal Services for Senior Citizens was of counsel for plaintiffs.

Thomas J. Hart and Lena S. Zezulin of Lippman & Hart for defendants.

MEMORANDUM OPINION OF UNITED STATES
DISTRICT JUDGE CHARLES R. RICHEY

This matter is before the Court on cross motions for summary judgment, which have been fully briefed and argued. Plaintiffs contend that defendants have taken actions that violate the Employee Retirement Income

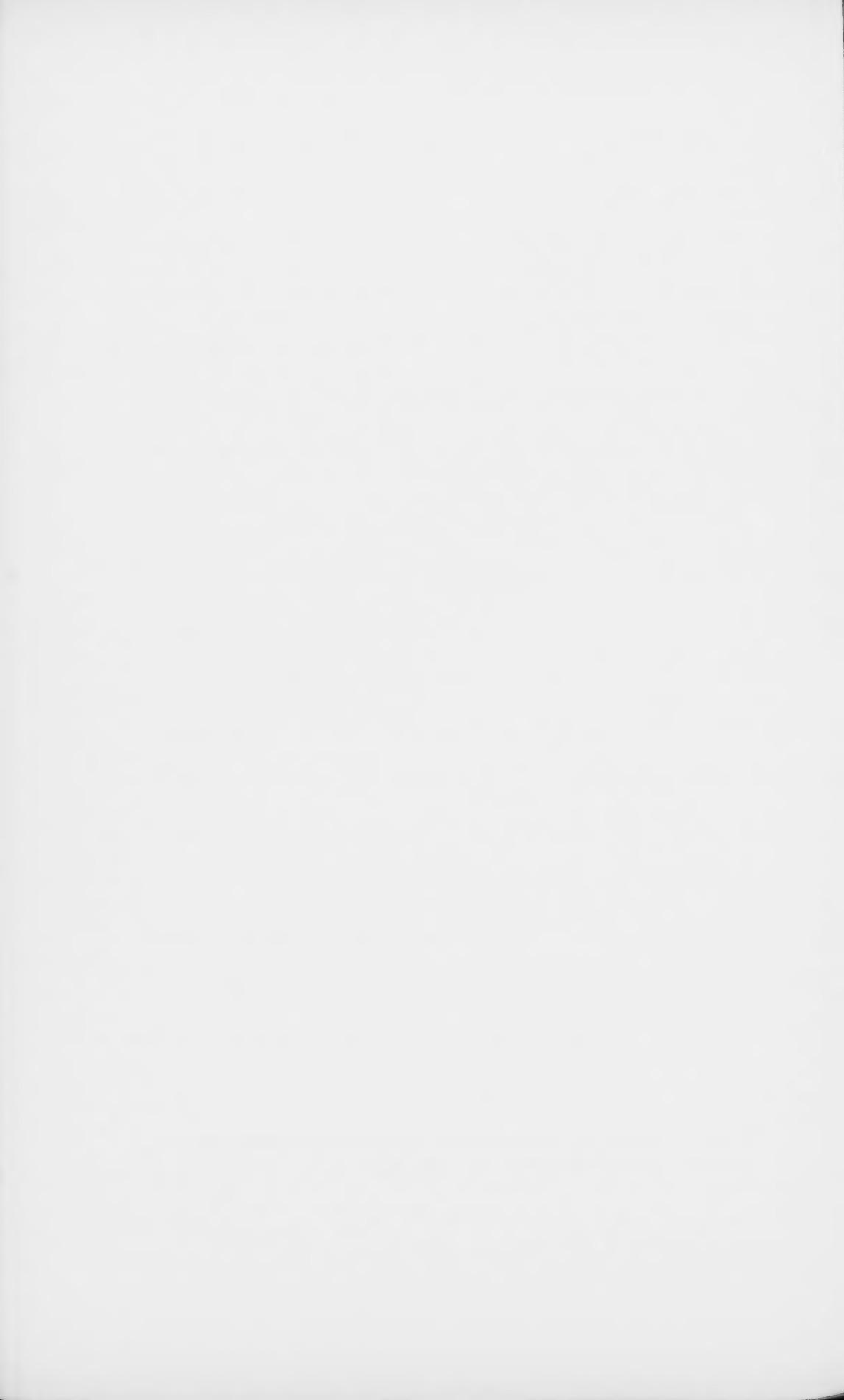


Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and § 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), and which have resulted in injury to a class of pension plan participants.¹ For the reasons set forth herein, the Court will grant plaintiffs' motion for summary judgment and provide the class the relief sought.

BACKGROUND

Plaintiff class is composed of all persons who have been or are participants in the National Shopmen Pension Plan, and who have received or are receiving benefits or whose benefit rights are or were otherwise vested under the plan, and whose past service credits have been reduced or eliminated by the Trustees as a result of their employer's or former employer's withdrawal from

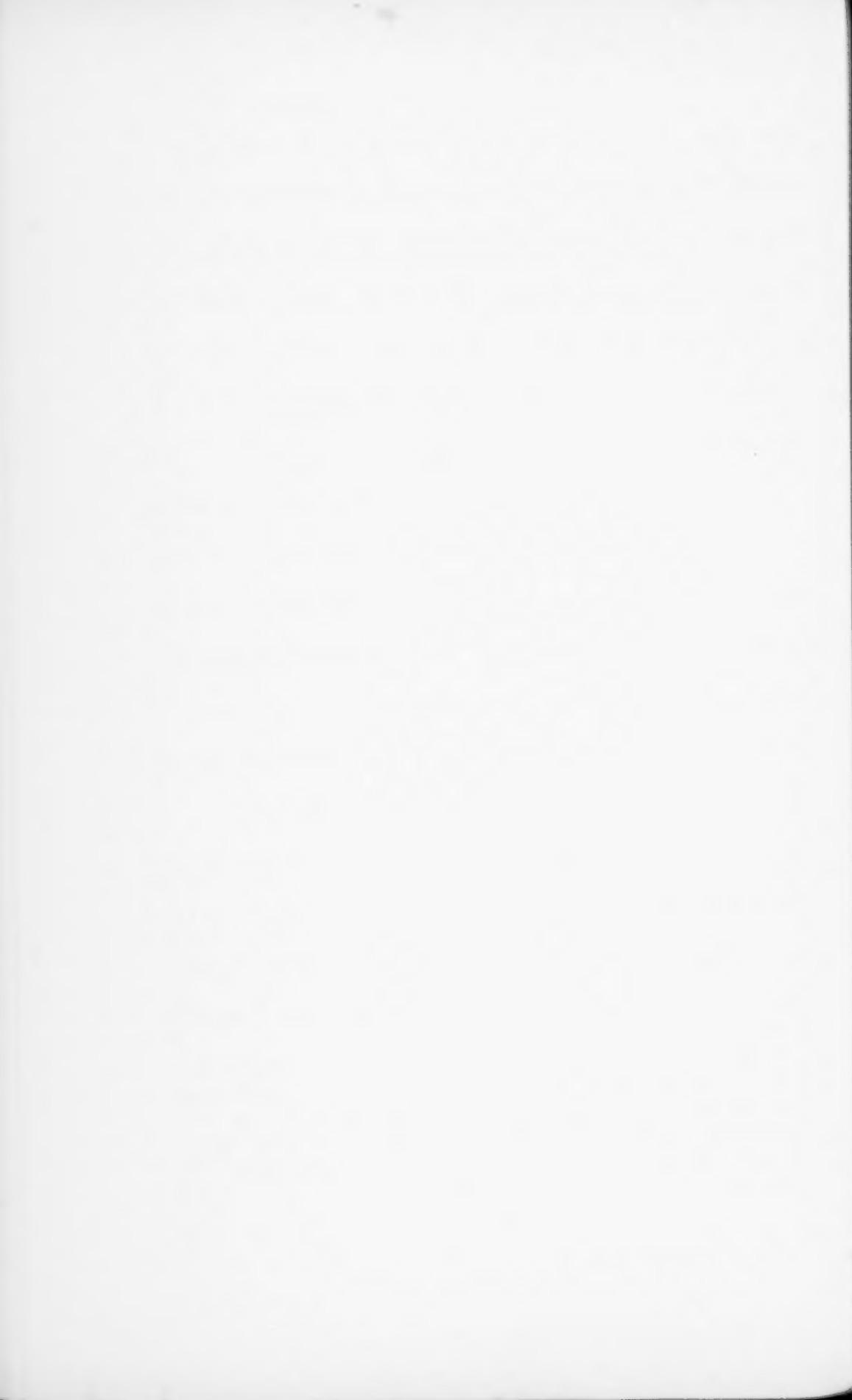
1. The Court granted plaintiffs' motion for class certification on May 19, 1983.



the Plan. However, the class does not include any individual who was a member of the class in Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982) (as defined at 1305 n.7). The class here consists of approximately 371 persons.

The named plaintiffs are two individuals -- George Stewart and Lee Roy Warren -- who receive a pension from defendant National Shopmen Pension Fund (the "Fund").² Messrs. Stewart and Warren are entitled to pension benefits due to their years of service with Anchor Post Building Products ("Anchor") and pursuant to Anchor's collective bargaining agreement with the Shopmen's local union. Mr. Stewart was an employee at Anchor from 1940 until 1972, when he retired. Mr. Warren

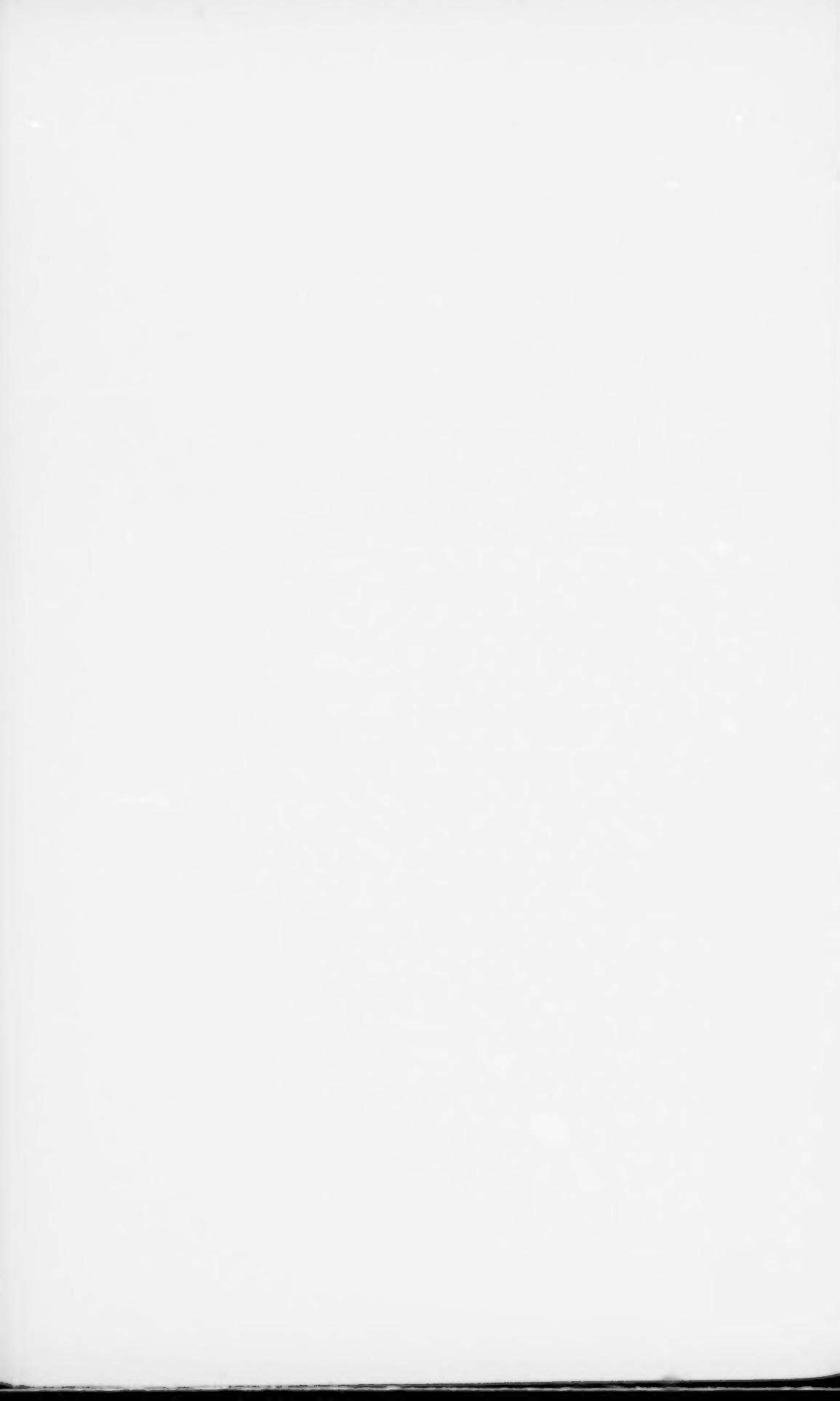
2. The defendants are the National Shopmen Pension Fund and its six Trustees. The parties have stipulated that the Fund is a multi-employer pension plan within the meaning of ERISA. 29 U.S.C. §§ 1002(2) and (37)(A).



worked at Anchor's Maryland plant from 1959 until 1979 when Anchor closed that plant.

Anchor joined the defendant Fund and began making contributions on behalf of its employees in 1969. At that time, Anchor's employees were granted pension credits for their years of service with their employer before joining the Fund. Thus, at the time of his retirement Stewart had 2.7 years of contributory service (service during years in which Anchor contributed to the Fund on his behalf) and 23 years of precontributory service (service before Anchor joined the Fund). Warren had 10.6 years of precontributory service and 10.4 years of contributory service.

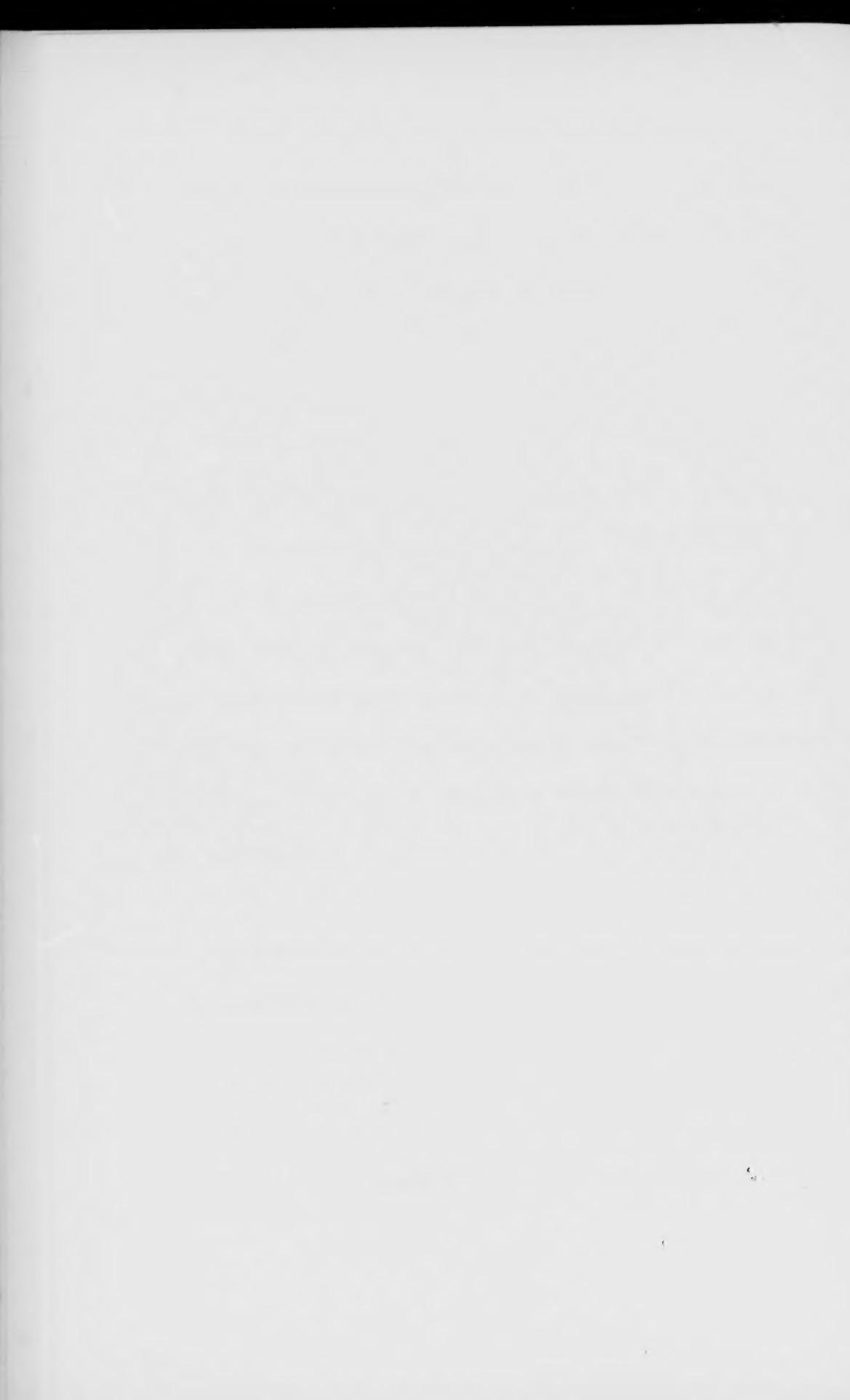
In 1979, when Anchor closed its Maryland plant, it ceased to contribute to the Fund. As was the usual procedure when an employer withdrew from the Fund, the Trustees ordered that an actuarial study be performed to



determine the effect of the withdrawal upon the Fund. The study disclosed that Anchor's withdrawal "dumped" \$750,000 of liability on the Fund. The study suggested that the Fund cancel all precontributory service credit to Anchor employees in order to decrease this liability. The cancellation would not completely deprive any recipient of vested pension rights but it would decrease the amount of the pensions due to employees who had precontributory credit. The Trustees adopted the study's suggestion and cancelled all precontributory credit. They did so pursuant to § 2.09 of the National Shopmen Pension Plan.³

As a result of the fund's decision, Mr. Stewart's pension was reduced from \$80/month

3. The Fund has operated pursuant to two different plans. When Anchor joined the Fund, the first plan (the "1969 plan") was in effect. In 1976, the plan was modified in response to the enactment of ERISA. It is this second plan (the "1976 plan") that contains § 2.09 the provision at issue here.



to \$9/month. Mr. Warren's pension suffered a reduction from \$89.50/month to \$45/month. Plaintiffs both appealed the decisions regarding their pensions to the Trustees of the Fund, but both appeals were denied. Consequently, plaintiffs filed this suit challenging the decision of the Fund's Trustees to cancel precontributory credit. Plaintiffs allege that the Trustees decision: 1) violated the vesting and nonforfeiture provisions of § 203 of ERISA; 2) violated § 203(c)(1)(B) of ERISA which provides that vesting schedule amendments trigger the right to choose to have benefits calculated under a Fund's pre-amendment plan;⁴ 3) constituted a decrease in their accrued benefits in violation of § 204(g) of ERISA; 4) was arbitrary and capricious in violation

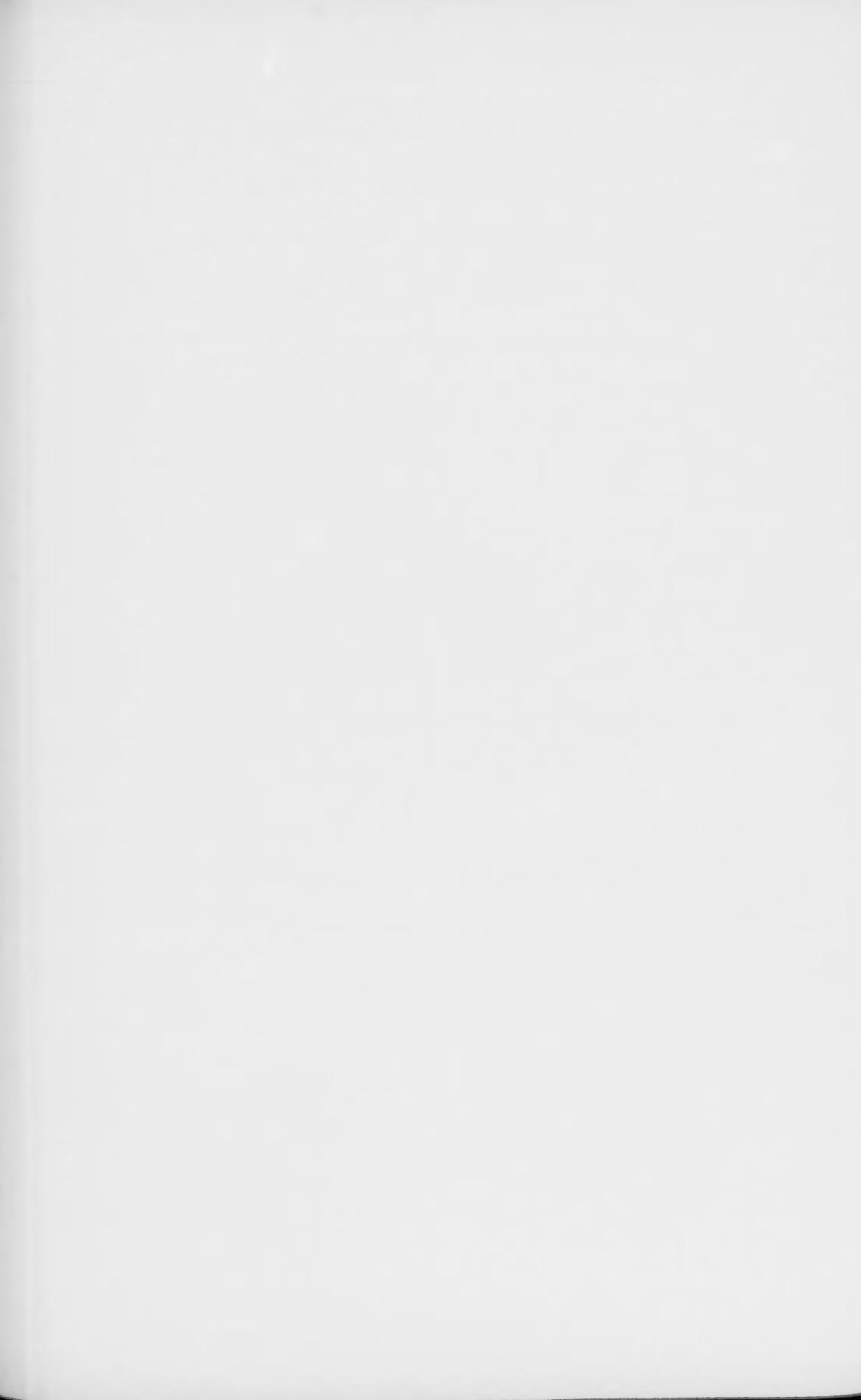
4. The term "pre-amendment plan" refers to the 1969 plan i.e., the original plan which was amended upon the passage of ERISA. The term is, therefore, synonymous with "pre-ERISA plan".

of ERISA's "sole and exclusive benefit" requirement; and 5) conflicted with the Plan's general vesting and nonforfeiture rules. Because the Court agrees with the second and third of plaintiffs' arguments, it need not reach the remainder of plaintiffs' contentions.

I

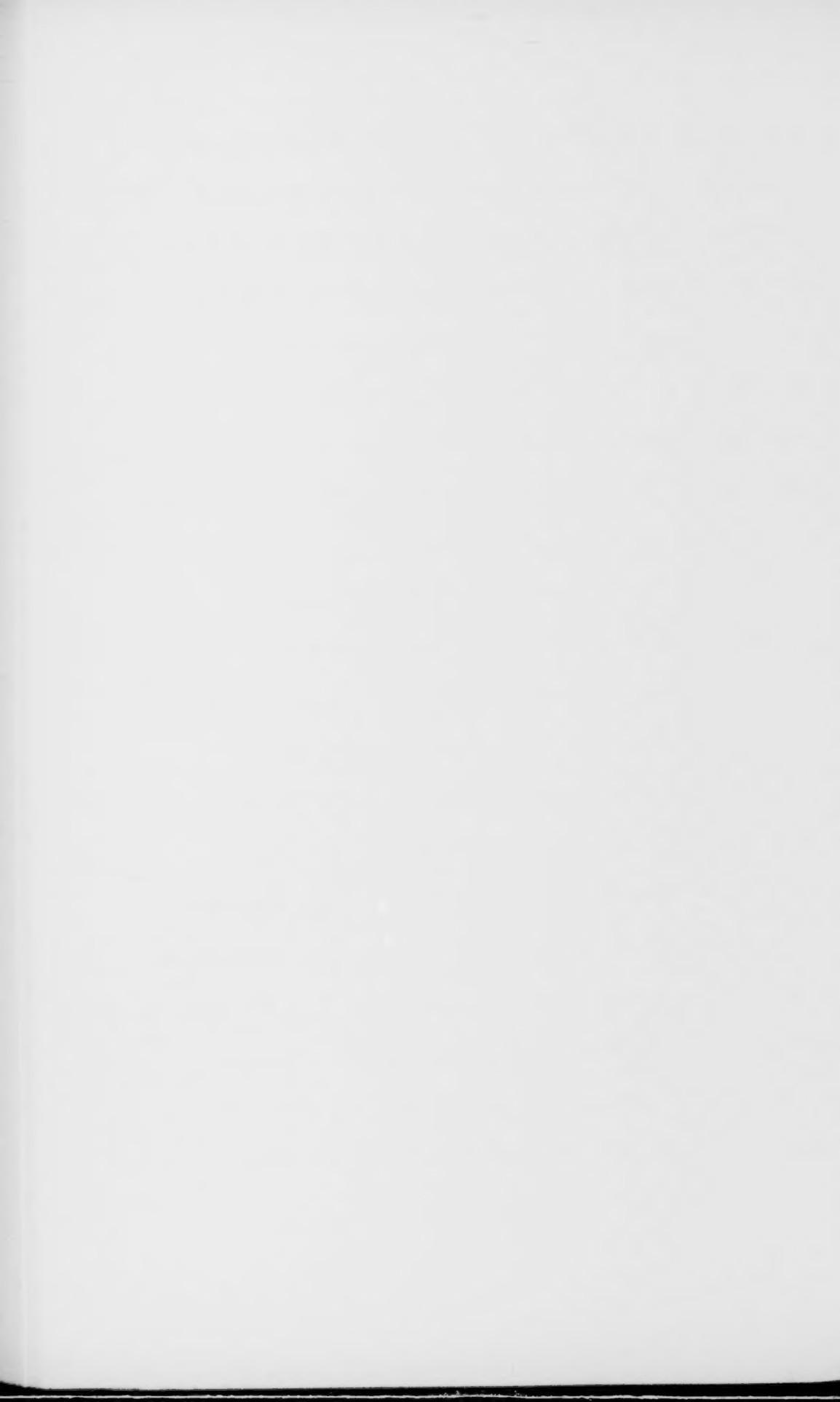
THE TRUSTEES' CANCELLATION OF THE PRECONTRIBUTORY CREDITS OF POST-ERISA PARTICIPANTS IS INVALID BECAUSE IT VIOLATES THE REQUIREMENTS OF ERISA § 203(c)(1)(B).

Under ERISA § 203(c)(1)(B), 29 U.S.C. § 1053(c)(1)(B), if a plan is amended so as to change its vesting schedule, participants with at least five years of service must be permitted to elect to have their benefits calculated under the pre-amendment plan. It has been stipulated that the Trustees did not view their application of § 2.09 to cancel precontributory credits as a plan



amendment changing the vesting schedule and therefore did not allow plan participants to exercise the option mandated by § 203(c)(1)(B). Thus, the only question is whether the Trustees' action constituted such an amendment. If the Court finds that the Trustees' action did constitute such an amendment, § 203(c)(1)(B) will clearly render their action invalid.

A plan's vesting schedule delineates the timetable by which a participant's benefits will become vested i.e. nonforfeitable. The vesting schedule in the National Shopmen Pension Plan provided that benefits were to be nonforfeitable after 10 years of service. The Trustees contend that because they did not officially change this schedule, the action they took pursuant to § 2.09 was not a vesting schedule amendment. However, because the effect of defendants' actions was to alter the vested benefits of the



plaintiffs, the Court holds that these actions do constitute a change in vesting schedule.

This issue was addressed by the Ninth Circuit in Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982).⁵ Dealing with the same plan

5. Plaintiffs argue that the issues in Fentron are identical to those presented here. Accordingly, plaintiffs contend that the Ninth Circuit's holding for plaintiffs in Fentron collaterally estops defendants from arguing that their cancellation of precontributory service credits did not violate § 203(c)(1)(B) of ERISA. The Court declines to apply estoppel because it finds that a significant factual difference between these cases renders the case at bar sufficiently different to demand individual consideration. See Montana v. United States, 440 U.S. 147, 155 (1979) (collateral estoppel should not be applied where controlling facts have changed significantly).

In Fentron, the Trustees applied § 2.09 to cancel all precontributory service credits not only for purposes of calculating benefits, but also for purposes of vesting requirements. After the Fentron court determined that cancellation of precontributory credits in such a manner as to divest previously vested employees was improper, the Trustees altered their position and only applied cancellation for purposes of calculating the amount of benefits. Here the question is whether

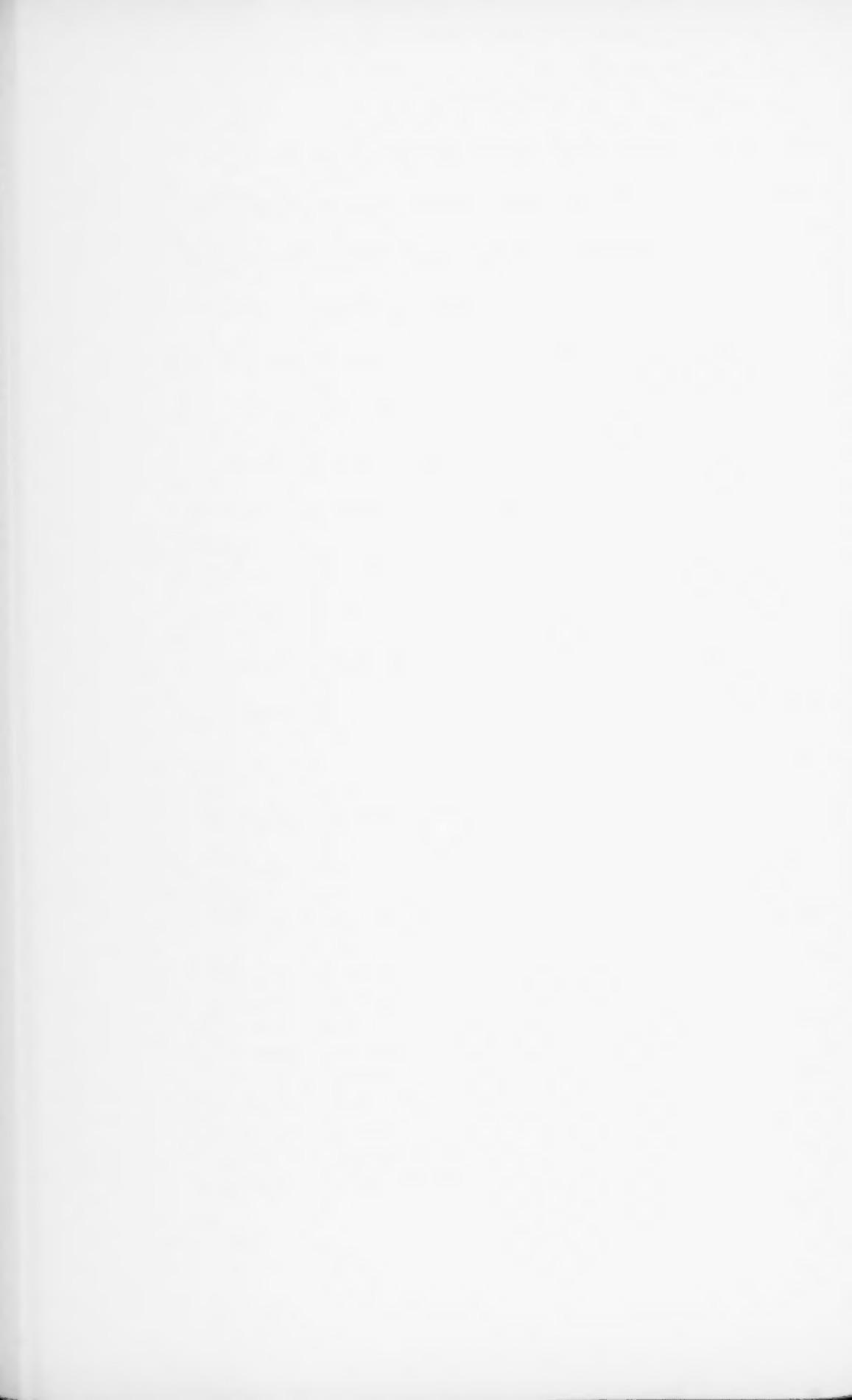
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at issue here and similar actions by the Trustees, the Circuit Court concluded that it was irrelevant "that the trustees' cancellation [did] not directly change the 1969 Plan vesting schedule . . . [so long as the cancellation] did change class members' vested rights." *Id.* at 1306. As stated by the Fentron court: "The Fund and its trustees cannot be permitted to do indirectly what would be prohibited if done directly by changing the vesting schedule without changing the vesting provisions of the plan."

Id.

Defendants' primary defense to plaintiffs' allegations is that their decision to cancel precontributory service credits

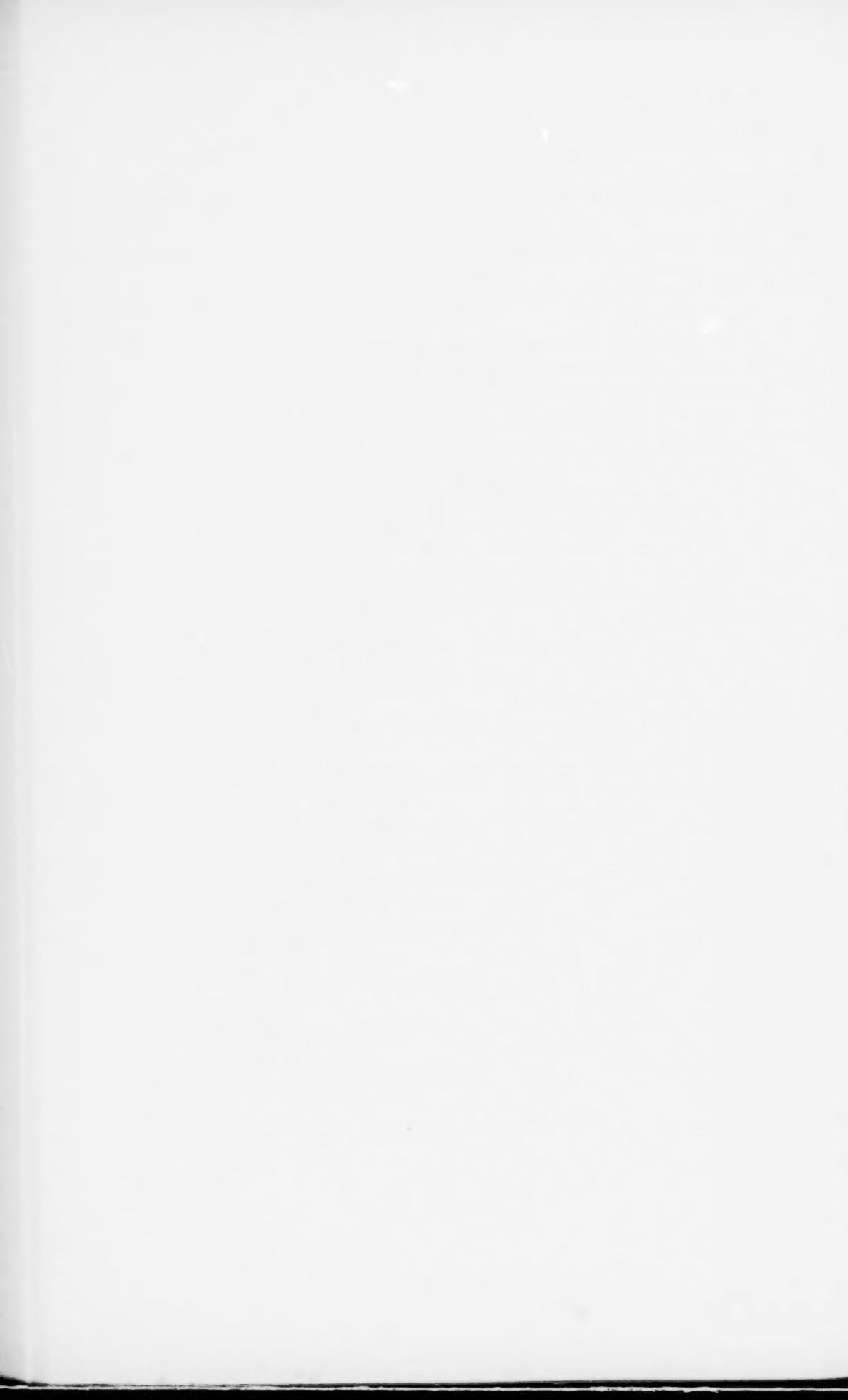
5. cont'd cancellation of past service credits resulting in reduction (but not divestment) of benefits triggers the option provided by § 203(c)(1)(B). The issues Fentron decided are not, therefore, sufficiently similar to satisfy the requirements of collateral estoppel, although Fentron does provide substantial guidance in addressing the questions presented in this case.



is specifically authorized by ERISA and therefore could not possibly be in violation of that Act. Defendants find this authorization in § 203(a)(3)(E) which provides that:

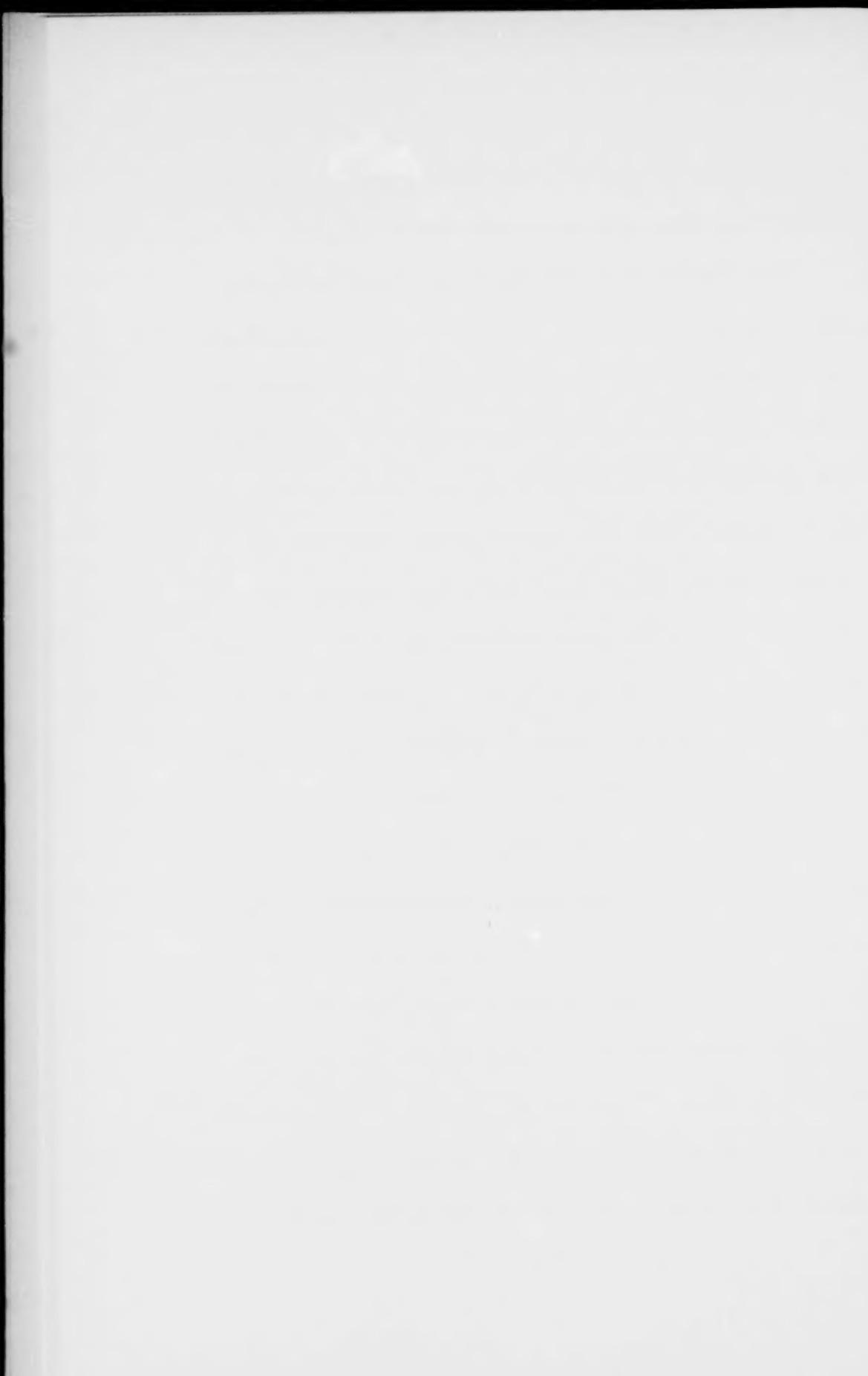
A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employers before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multi-employer plan.

However, this provision does not do what defendants claim that it does -- it does not validate all cancellations of precontributory credits. Rather, this section merely states that such cancellation will not violate the nonforfeitality provisions of ERISA. Accordingly, § 203(a)(3)(E) has no bearing on the Court's conclusion that the Trustees' action constituted a vesting schedule amendment that triggers the right



of participants to have their benefits calculated under the pre-amendment plan.

The Court's holding that Fund participants have the right to have their benefits calculated under the pre-amendment plan is not, however, applicable to all members of the plaintiff class. It has been widely held that § 203 of ERISA only applies to those individuals who were employees on January 1, 1976, the effective date of that section. See, e.g., Cohen v. Martin's, 694 F.2d 296 (2d Cir. 1982); Fremont v. McGraw-Edison Co., 606 F.2d 752, 755 (7th Cir. 1979.), cert. denied, 445 U.S. 951 (1980). The plaintiff class here consists of some individuals whose benefits were fully vested or who were actually receiving benefits, but who were not actively employed on the relevant date. Although the Court's ruling relying on § 203(c)(1)(B) cannot apply to these employees, there is an additional



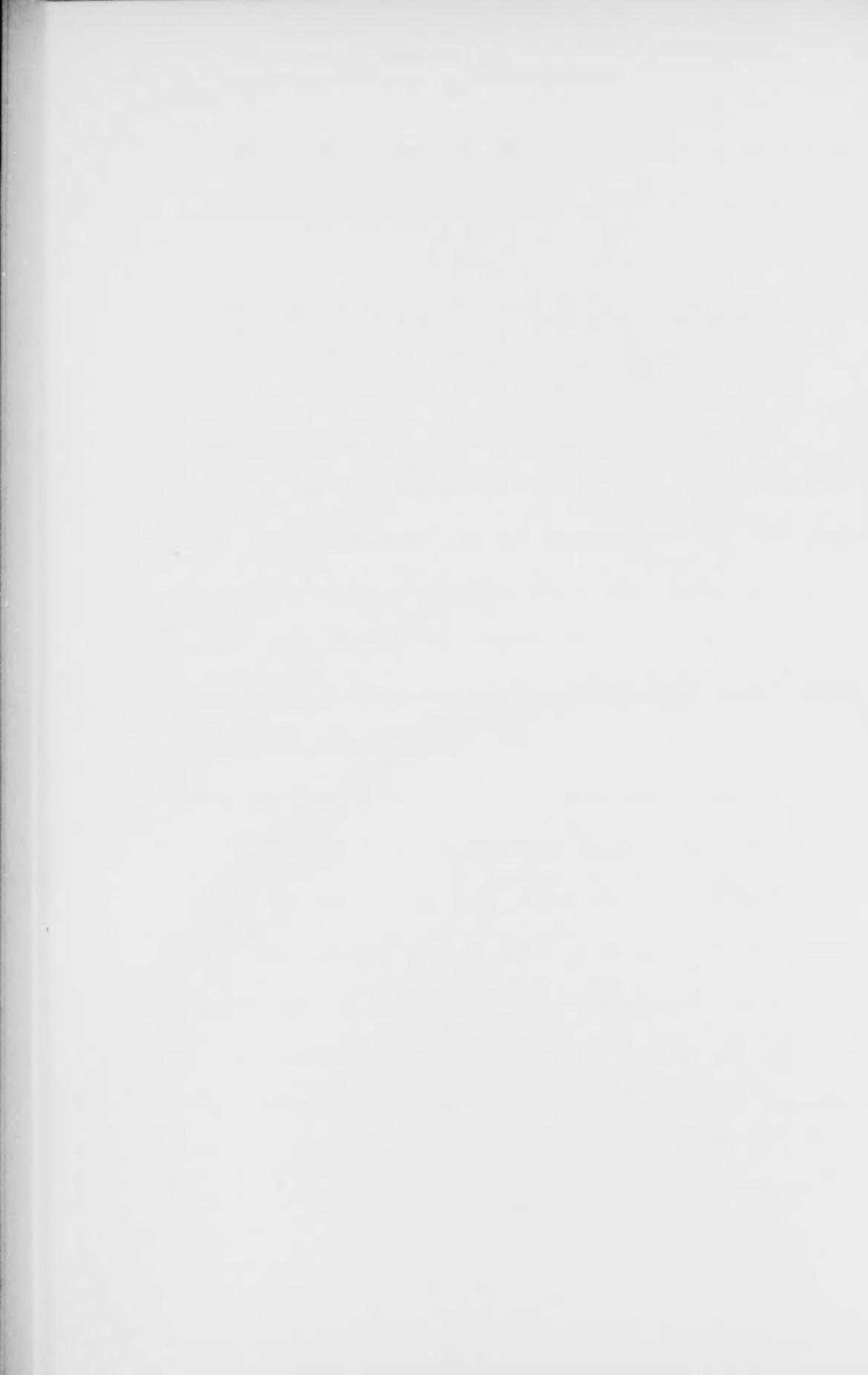
provision entitling these pre-ERISA beneficiaries to relief.

II

THE TRUSTEES' CANCELLATION OF PRECONTRIBUTORY CREDITS FOR ALL PARTICIPANTS IS INVALID BECAUSE IT VIOLATES THE REQUIREMENTS OF ERISA § 204(g).

ERISA § 204(g) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment to the plan [unless the plan administrator files a notice with the Secretary of Labor and the Secretary approves such amendment]." 29 U.S.C. §§ 1054(g) & 1082(c)(8). The parties have stipulated that the Trustees did not believe their actions were governed by § 204 and therefore did not seek the approval of the Secretary. However, the Court finds the Trustees' disregard of § 204 to be improper.

It is indisputable that the Trustees' action here decreased the accrued benefits



of all members of the plaintiff class.⁶ Further, the Court holds, pursuant to the same reasoning employed to find an amendment in the vesting schedule, that this reduction in benefits was the result of a plan "amendment." The Trustees cannot be allowed to do indirectly -- by applying § 2.09 to decrease benefits -- what they are forbidden to do directly -- by passing an amendment accomplishing the same end. See Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300, 1306 (9th Cir. 1982).

Moreover, the Court holds that § 204 of ERISA, unlike § 203, applies to both pre-ERISA and post-ERISA plan participants. It appears that the question of whether § 204 should apply to pre-ERISA employees is one of first impression. While there are several

6. By definition, the plaintiff class is composed of individuals whose benefits were reduced when their pre-contributory service credits were cancelled.

cases holding that ERISA should not be applied retroactively, these decisions have generally confined their holdings to § 203 (ERISA's vesting requirements) and have relied upon the distinction in the Act between "participants" and "employees."⁷ See, e.g., Cohen v. Martin's, 694 F.2d 206 (2d Cir. 1982); Fremont v. McGraw-Edison Co., 606 F.2d 752, 755 (7th Cir. 1979), cert. denied, 445 U.S. 951 (1980). However, this distinction leads to a contrary interpretation of § 204.

? Several of these cases contain some broad language noting that ERISA is not to be given retroactive application. See, e.g., Smith v. CMTA-IAM Pension Trust, 654 F.2d 650, 657 (9th Cir. 1981). The Court notes that recognizing the rights of pre-ERISA retirees under § 204 of the Act does not conflict with this language. Under § 204, the accrued benefits of participants are not to be decreased unless special permission is obtained. Since pre-ERISA retirees are participants who are being deprived of their benefits in violation of this provision, they must have standing to challenge actions taken long after the Act's effective date. Accordingly, the Act is not given retroactive application.

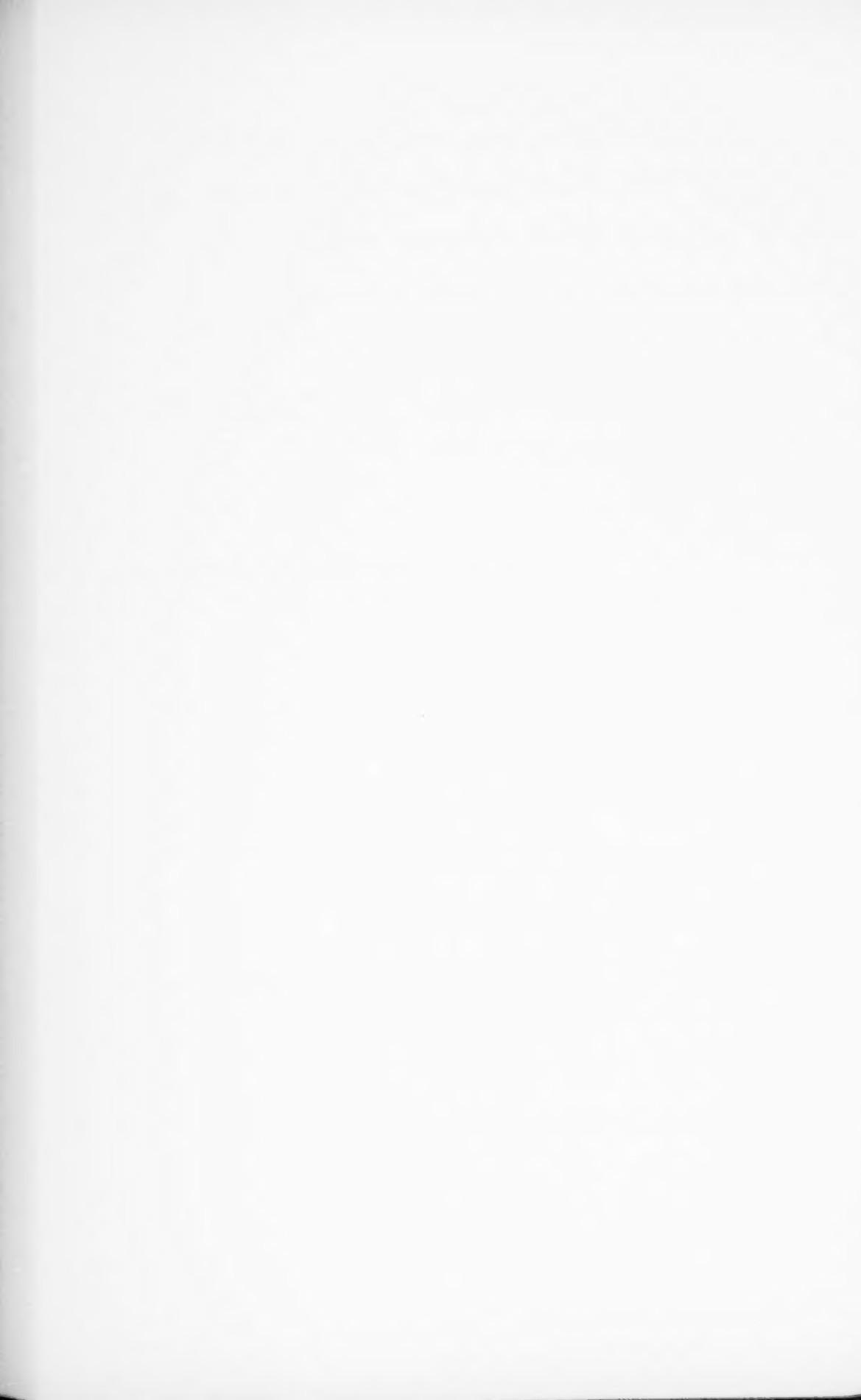
In assessing the applicability of ERISA's provisions, it is important to recognize the Act's distinction between "employees" and "participants." ERISA defines the term "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). By contrast, an "employee" is defined as "any individual employed by an employer." 29 U.S.C. § 1002(6). Thus, plaintiff Stewart and all class members who were receiving benefits but were no longer employed by their contributing employer at the effective date of ERISA qualify as participants under the Act but not as employees.

The section of ERISA at issue here, § 204, specifically addresses the benefits of participants. This is in direct contrast to § 203 which speaks to the rights of employees.

The Court concludes, relying upon this distinction, that § 204 applies to both pre-ERISA and post-ERISA retirees and thus to the entire plaintiff class, even though § 203 does not.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/
UNITED STATES DISTRICT JUDGE
CHARLES R. RICHEY



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE STEWART, et al.,

:

Plaintiffs

: CA No.: 82-3055

v.

: FILED

NATIONAL SHOPMEN PENSION
FUND, et al.,

: MAY 20 1983

Defendants.

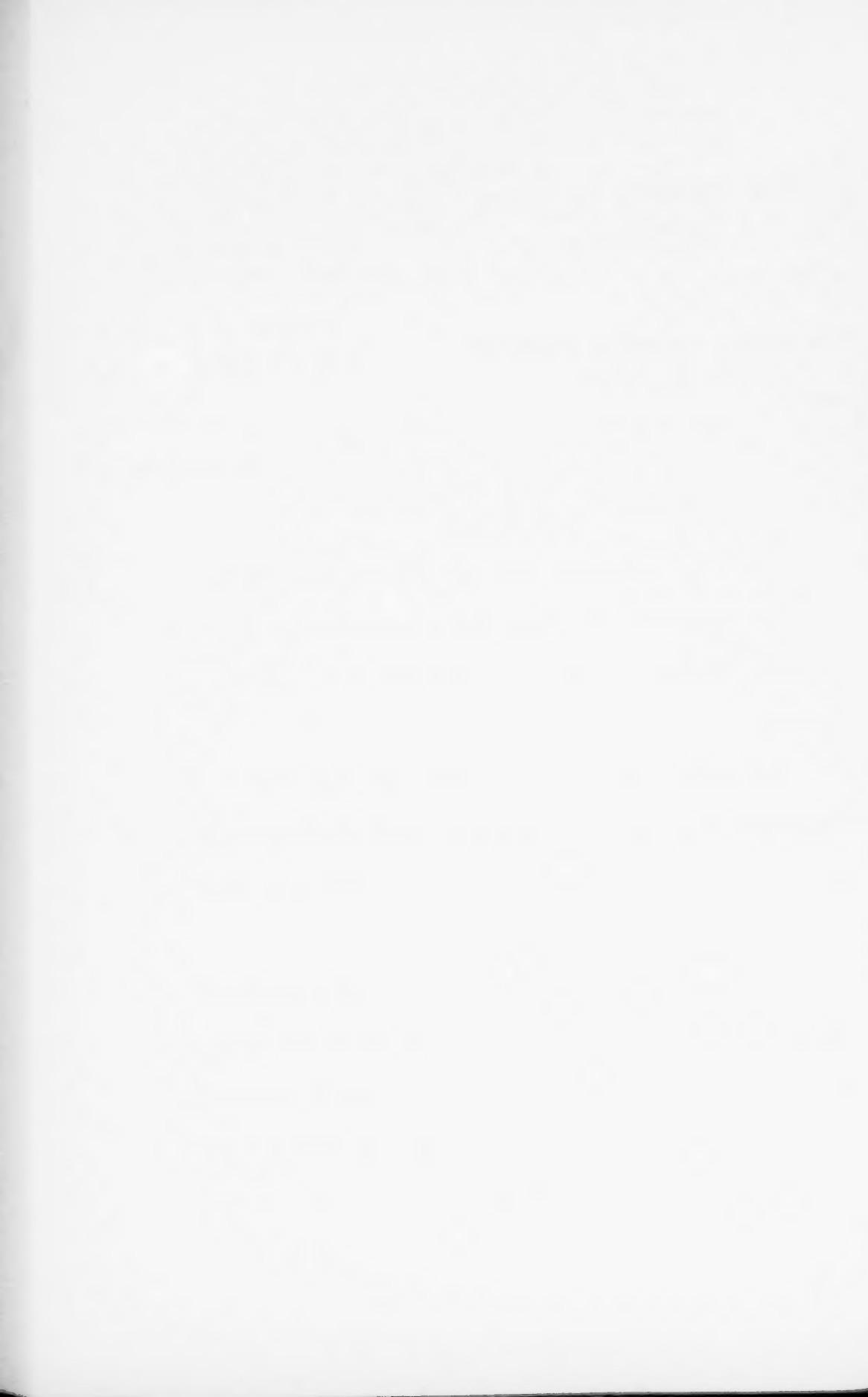
: CLERK, U.S. DISTRICT
COURT
DISTRICT OF COLUMBIA

O R D E R

For the reasons set forth in the Memo-
randum Opinion of even date herewith, it is,
by the Court, this (19) day of May, 1983,
hereby

ORDERED that plaintiffs' motion for
summary judgment is granted and defendants'
motion for summary judgment is denied; and
it is further

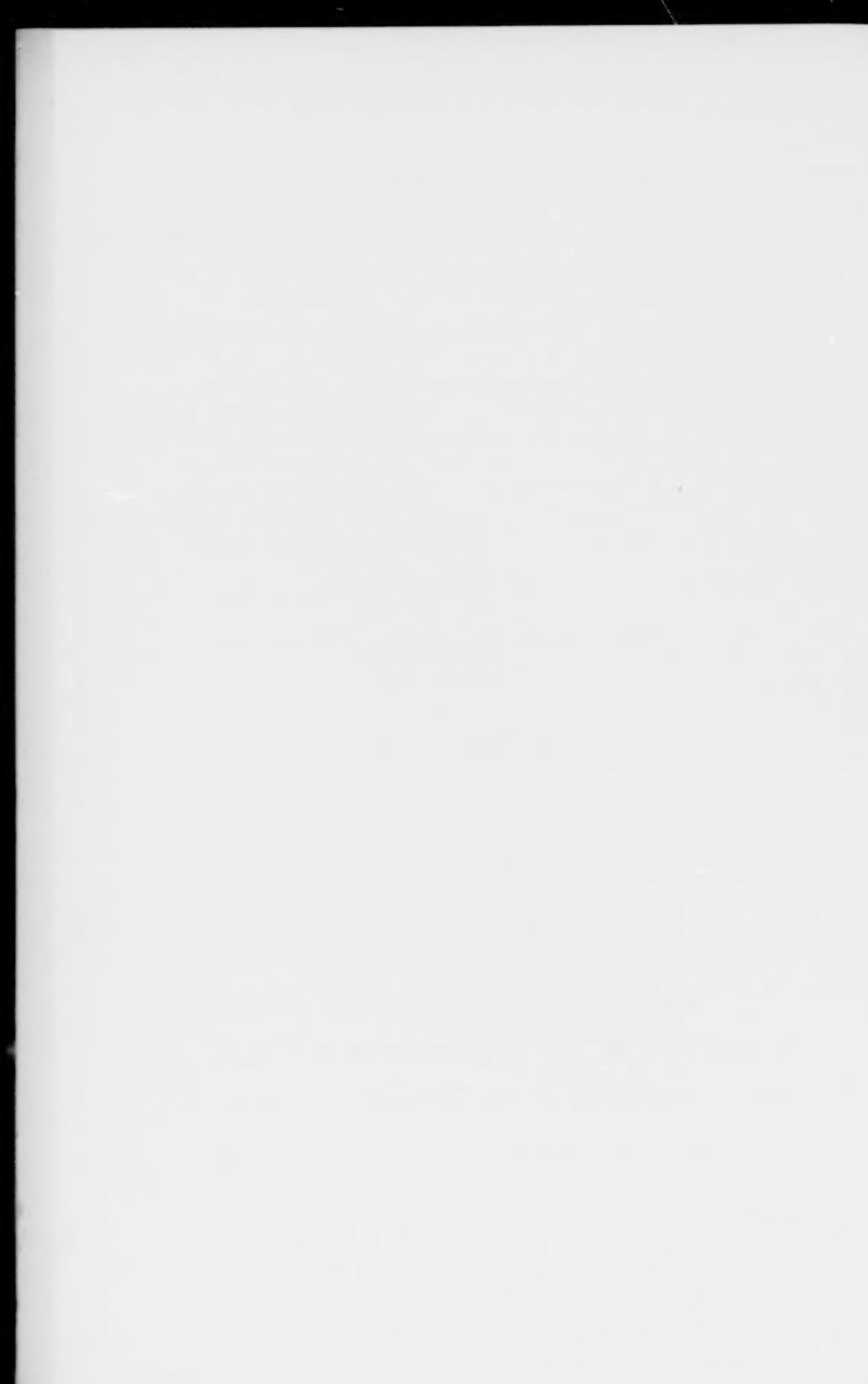
ORDERED that the Trustees' application
of § 2.09 of defendant's 1976 Plan to the
plaintiff class is declared invalid because
it violated § 203(c)(1)(B) and § 204(g) of



the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1053(c)(1)(B) & 1054(g); and it is further

ORDERED that defendants, their successors, agents, employees and all persons acting in concert with them are enjoined from, applying § 2.09 of the Plan (or any other comparable provision) or from otherwise administering the plan, in a manner inconsistent with the Court's Memorandum Opinion; and it is further

ORDERED that defendants, their successors, agents, employees and all persons acting in concert with them are enjoined from denying, cancelling or otherwise not counting, and from continuing to deny, cancel or otherwise not count, the precontributory credits of all members of the plaintiff class, with the result that their vested benefits are and have been calculated at a lower amount than that to which they are otherwise entitled;

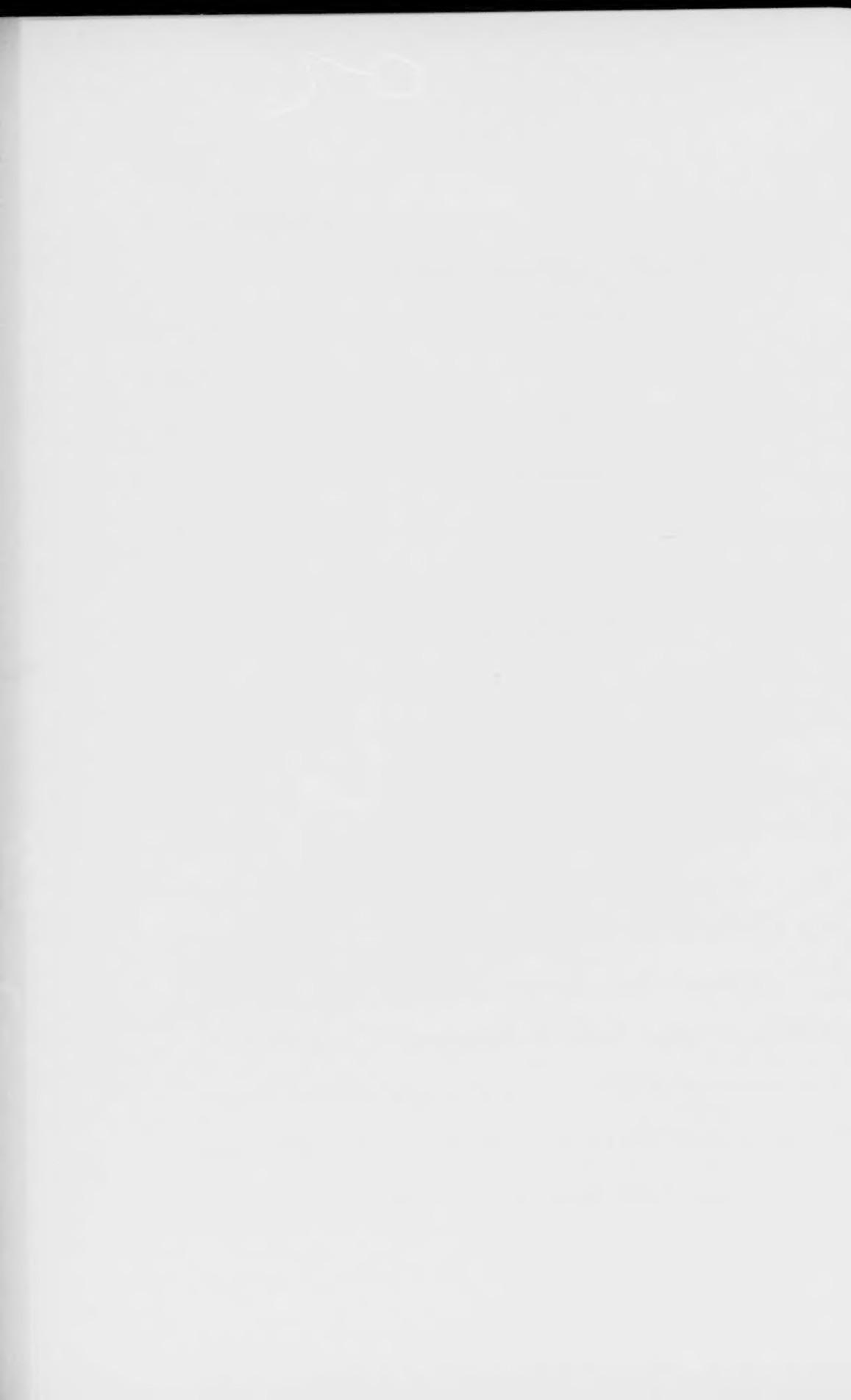


and it is further

ORDERED that defendants immediately restore the past service credits previously withdrawn, cancelled, or otherwise not counted to plaintiff class members; and it is further

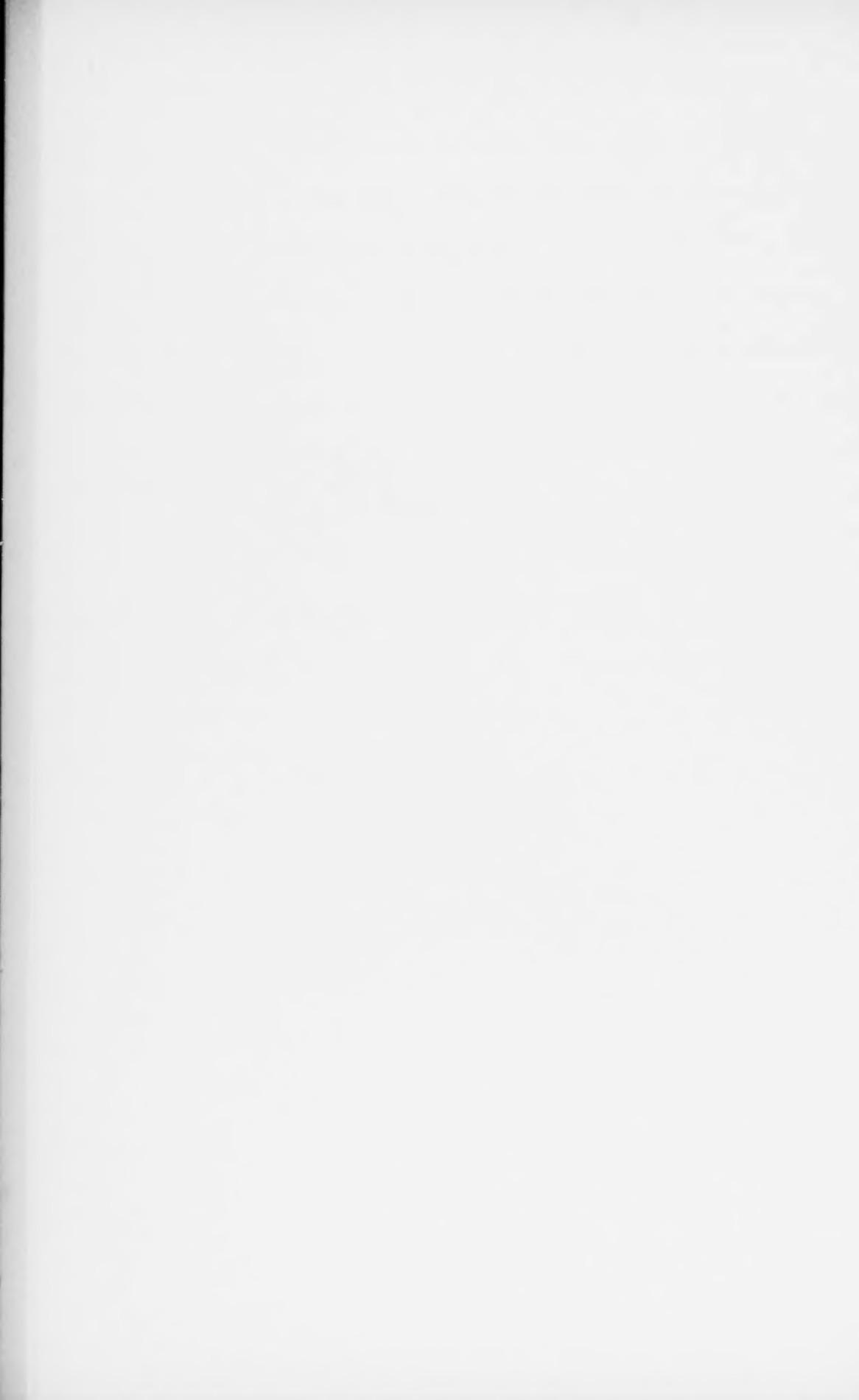
ORDERED that defendants immediately calculate the benefits to which plaintiffs are entitled based on all the credits which they have earned, including those which are hereby restored, and that defendants pay all future monthly benefits based on those calculations beginning with the first pension payment due to be mailed out, but in no event less than fifteen (15) days or more than forty-five (45) days from the date hereof; and it is further

ORDERED that within thirty (30) days from the date hereof defendants calculate the past benefits to which plaintiff class members are entitled based on the restored precontributory credits and reimburse class



members in lump sum checks for the difference between that to which they were entitled and that which they received, including legal interest from the dates on which the incorrect payments were made.

/s/
UNITED STATES DISTRICT JUDGE
CHARLES R. RICHEY



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE STEWART, et al., : CA No. 82-3055
Plaintiffs, : FILED
v. : MAY 20 1983
NATIONAL SHOPMEN PENSION :
FUND, et al., : CLERK, U.S.
Defendants. : DISTRICT COURT
 : DISTRICT OF
 : COLUMBIA

O R D E R

Before the Court are plaintiffs' Motion for An Order Certifying the Class, defendants' opposition thereto, and the entire record herein. Plaintiff seeks to certify a class under Fed. R. Civ. P. 23(b)(2) composed of all participants in the National Shopmen Pension Plan who have received or are receiving benefits or whose rights are or were otherwise vested under the plan, and whose past service credits have been reduced, eliminated, or otherwise not counted by the Trustees as a result of their

employer's or former employer's withdrawal from the Fund, and who were not members of the plaintiff class in Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982) as defined at 1305 n.7.

Defendant does not contest plaintiffs' satisfaction of two of the requirements of Rule 23(a) -- numerosity and commonality. Furthermore, it is clear that plaintiffs do meet these requirements: the class will consist of 371 individuals joined by the common fact that they were all deprived of past service credits by defendants upon the withdrawal of their employer from the defendant fund. The Court finds that plaintiffs also meet the remaining two requirements of Rule 23(a) -- typicality and adequacy.

Plaintiffs' claims are typical if they arise "from the same event or practice or course of conduct that gives rise to the



claims of other class members and his or her claims are based on the same legal theory." EEOC V. Printing Industry, 92 F.R.D. 51, 54 (D.D.C. 1981). Here, plaintiffs rely on the same legal arguments and the plaintiff class is by definition composed of those individuals to whom defendants applied their policy of cancelling past service credits upon withdrawal of their employer from the Fund. Accordingly, the named plaintiffs' claims arise from the same practice to which the entire class was subjected and therefore their claims are typical.

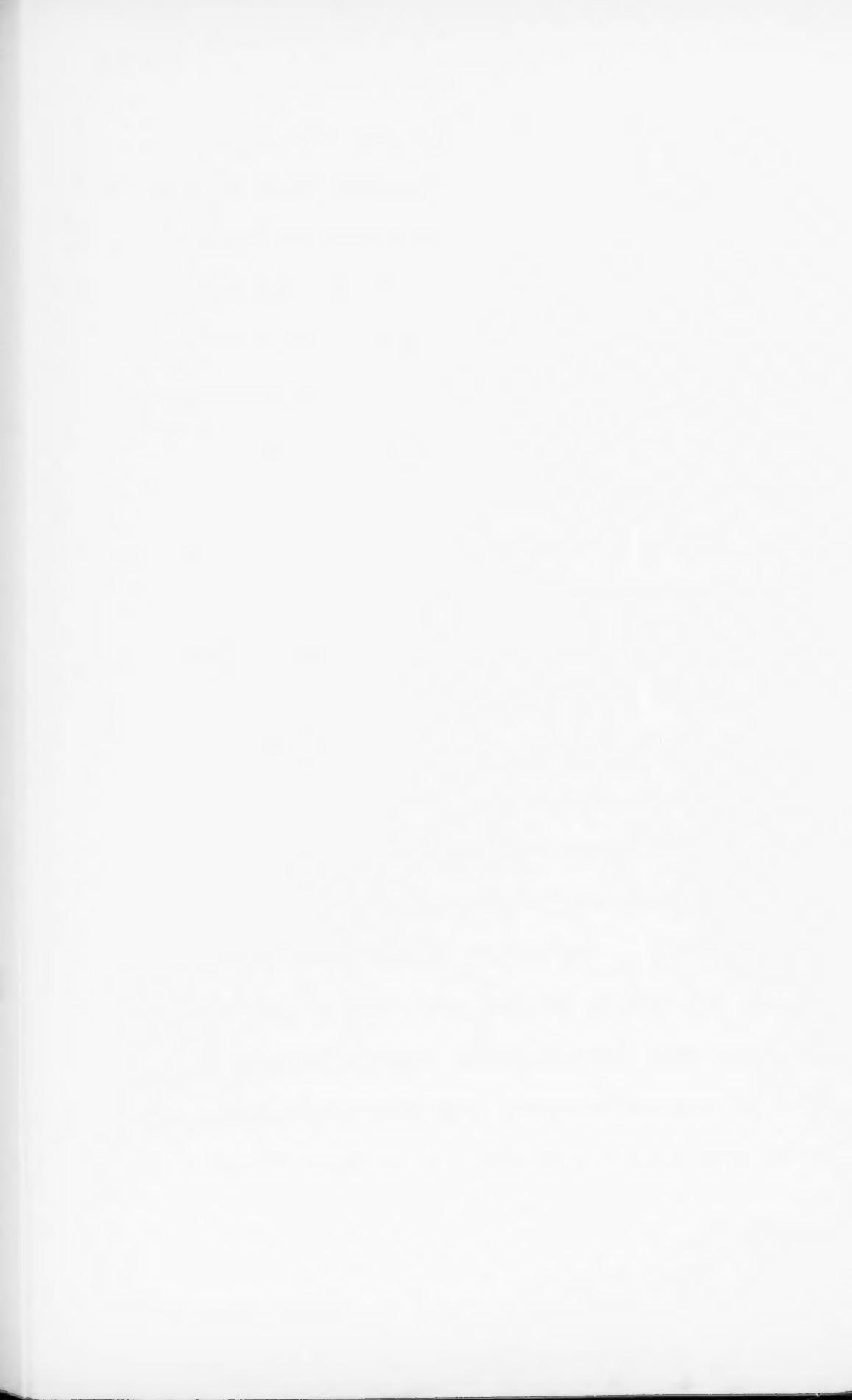
The requirement of adequacy is met if:

- 1) there are no conflicting interests between the named plaintiffs and the class members and 2) the representative plaintiffs appear able to vigorously pursue the interests of the class through qualified counsel.

National Association of Regional Medical Programs v. Mathews, 551 F.2d 340, 345

(D.C. Cir. 1976), cert. denied, 431 U.S. 954 (1977). It is incontestible that plaintiffs and their counsel have demonstrated their ability to vigorously prosecute this action. Accordingly, defendants attack the first of the adequacy criteria, contending that plaintiffs cannot adequately represent the class because the resolution of their claims is tied to the specific facts of the withdrawal of their individual employer. While it is true that some of the facts surrounding the withdrawal of each employer will differ, defendants have demonstrated no reason why the variations in these facts will render the interests of the named plaintiffs antagonistic to those of the class. The Court finds that plaintiffs' interests do not conflict with those of the class and believes that plaintiffs will be adequate class representatives.

Thus, all four requirements of Rule 23(a)



have been met.

Defendants additionally argue that plaintiffs have not met the criteria of Rule 23(b)(2) which require plaintiffs to show that the defendants have "acted or failed to act on grounds generally applicable to the class." This argument has already been disposed of above where the Court notes that the issue in this litigation is whether the Fund Trustees could validly cancel the precontributory credits of employees of withdrawing employers. Thus, plaintiffs are specifically challenging the actions of the defendants toward the whole of the plaintiff class and this challenge meets the requirements of Rule 23(b)(2).

Accordingly, it is, by the Court, this (19) day May, 1983 hereby,

ORDERED that the plaintiff class defined in this Order is certified under Fed.R.Civ. P.



23(b)(2). Because the class is certified under Rule 23(b)(2) no notice will be required.

/s/
UNITED STATES DISTRICT JUDGE
CHARLES R. RICHEY

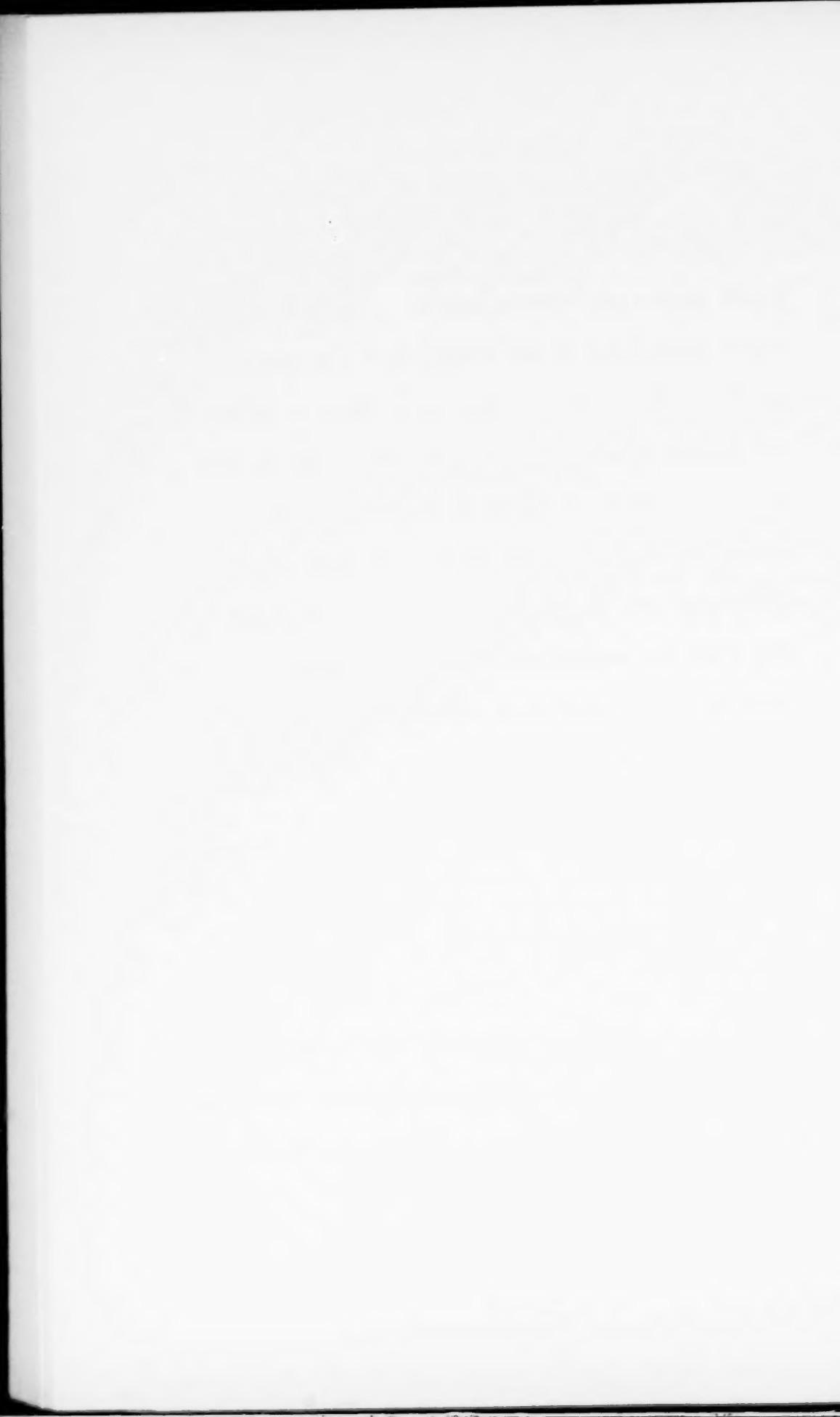


29 U.S.C. §1053(a)(3)(E)(i)

A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

29 U.S.C. §1053(c)(1)(B)

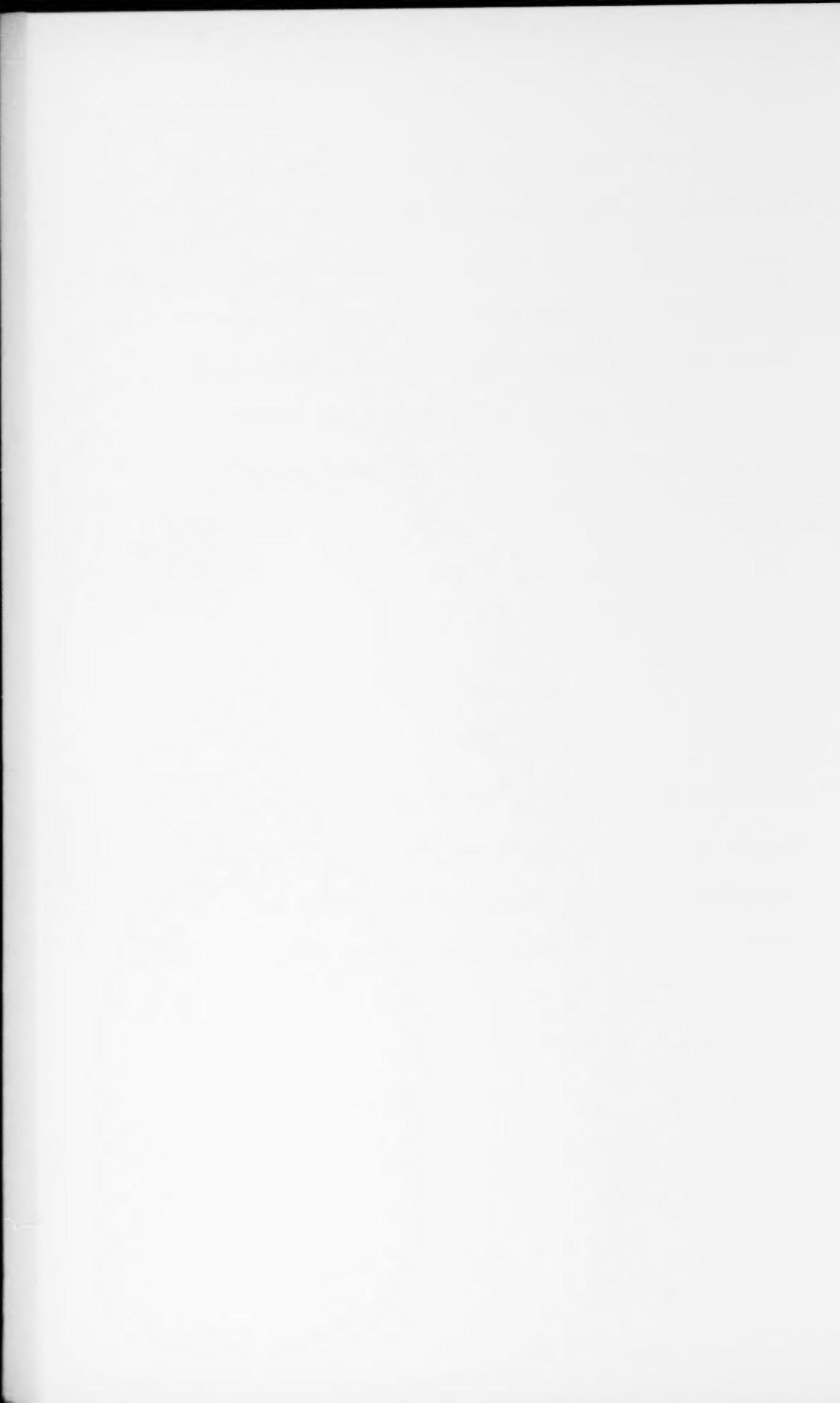
A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of



subsection (a)(2) of this section unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his non-forfeitable percentage computed under the plan without regard to such amendment.

29 U.S.C. §1054(g)

The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082 (c)(8) of this title.



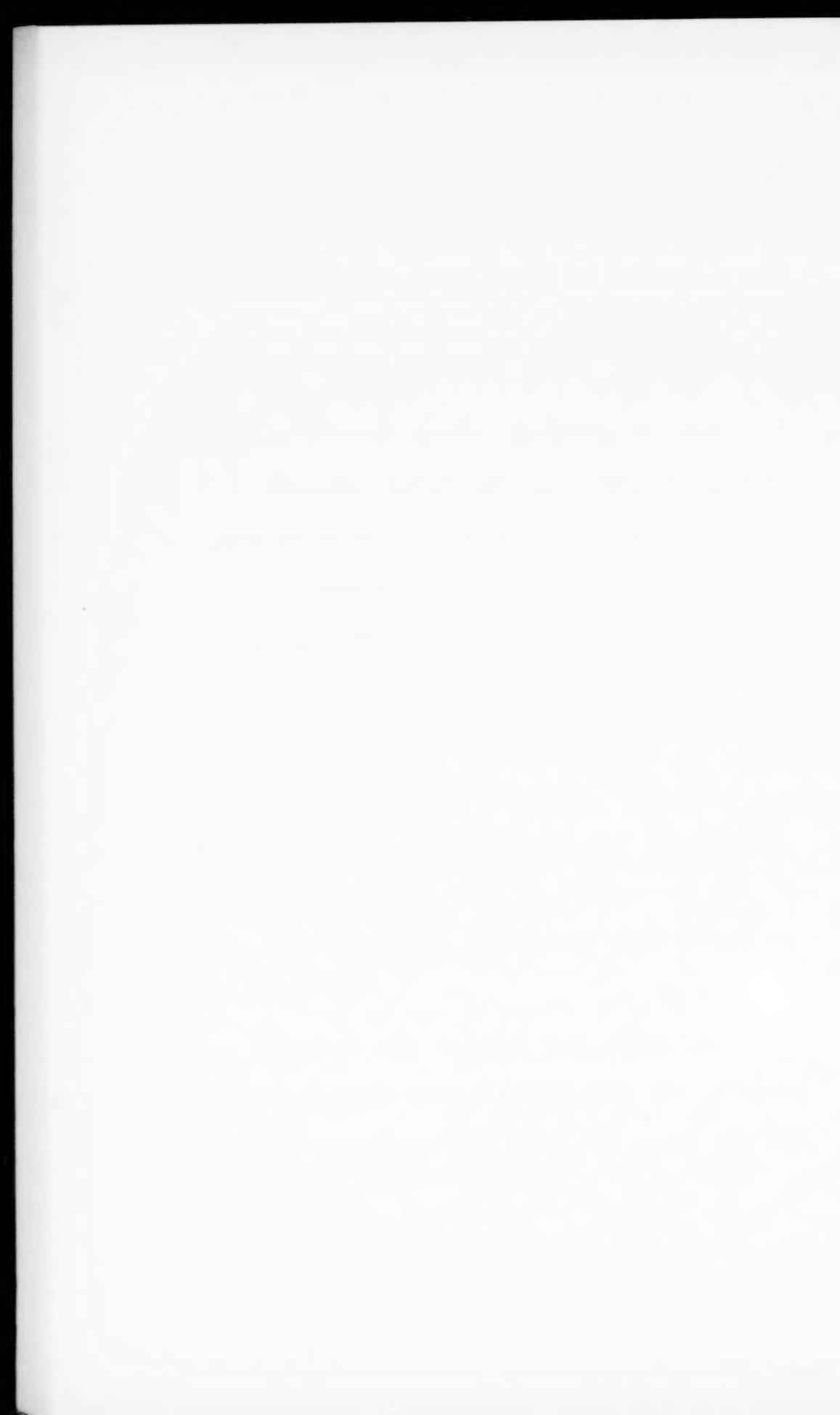
29 U.S.C. §1082(c)(8)

For purposes of this part, any amendment applying to a plan year which --

(A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the



extent required by the circumstances,

shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 1083(b) of this title) and that



waiver under section 1083(a) of this
title is unavailable or inadequate.

No. 83-2122

AUG 14 1984

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

GEORGE STEWART and LEE ROY WARREN,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

NATIONAL SHOPMEN PENSION FUND, A. S. GOODWIN,
SAMUEL SPADEA, KENNETH STEWART, DENNIS R. TONEY,
RICHARD A. SMITH, and W. J. MUSE,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS
NATIONAL SHOPMEN PENSION FUND, et al.,
IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the implementation of a multiemployer pension plan provision which, pursuant to the express authorization of ERISA Section 203(a)(3)(E), provides for the cancellation of accrued benefits attributable to the precontributory service of employees of an employer that withdraws from the plan is nevertheless a violation of ERISA Section 203(c)(1)(B) because such action constitutes a change in the plan's vesting schedule.
2. Whether the cancellation of precontributory service credit pursuant to an ERISA Section 203(a)(3)(E) authorized past service disregard rule is nevertheless proscribed by ERISA Section 204(g) because such action constitutes an "amendment of the plan" which reduces accrued benefits.

(i)

PARTIES TO THE PROCEEDING

The National Shopmen Pension Fund

A. S. Goodwin, Trustee

Samuel Spadea, Trustee

Dennis R. Toney, Trustee

Richard A. Smith, Trustee

Kenneth Stewart, Trustee

W. J. Muse, Trustee

George Stewart

Lee Roy Warren

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IN THE
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v.

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**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

BRIEF FOR RESPONDENTS
NATIONAL SHOPMEN PENSION FUND, et al.,
IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 730 F.2d 1552 (D.D. Cir. 1984). It appears in the Appendix to the petition at pages 1a to 56a. The decision of the District Court is reported at 563 F. Supp. 776 (D.D.C. 1983) and appears in the Appendix to the petition at pages 57a to 73a.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was issued on March 30, 1984 (Pet. App. A, 1a). The petition for writ of certiorari was filed on June 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

This case involves Sections 203(a)(3)(E), 203(c)(1)(B), and 204(g) of the Employee Retirement Income Security Act, as amended (ERISA) (29 U.S.C. §§ 1053(a)(3)(E)(1), 1053(c)(1)(B) and 1054(g)), and Section 411(a)(3)(E) of the Internal Revenue Code (26 U.S.C. § 411(a)(3)(E)).

STATEMENT OF THE CASE

This is an action in which Petitioners challenged an established practice among multiemployer pension funds: the voluntary granting of precontributory pension service credits to the employees of newly contributing employers *contingent* upon the employer's continued participation in the plan. Petitioners contended below that ERISA Sections 203(c)(1)(B) and 204(g) effectively prevent a plan from ever cancelling a grant of precontributory service when an employer withdraws from a plan even though ERISA Section 203(a)(3)(E) expressly authorizes such cancellations. Petitioners' position was rejected by a unanimous panel of the court of appeals below.

A. The Practice of Granting Precontributory Pension Service Credits

It has long been a common practice for multiemployer pension plans, such as the National Shopmen Pension Fund, to grant pension credits to the employees of newly participating employers for their years of service with the employer before it first joined the plan (and therefore first became obligated to make contributions on behalf of its employees). The granting of such precontribu-

tory service credits (which are sometimes called "past service credits") enables the older employees of a new contributor to receive significantly greater pension benefits than they would receive if pensions were based solely on contributory service credits (i.e., credits for service after the employer began making contributions).¹ Indeed, many workers might never receive a pension benefit of any sort were it not for the granting of precontributory service credits.

No law requires that precontributory service credits be granted. To the contrary, ERISA specifically allows plans to ignore service with an employer before the employer becomes a contributor.²

The granting of precontributory service is very costly to a fund. It immediately creates liabilities to the fund (since benefit obligations have come into existence) for which no funds have yet been received. Since the relationship between a contributing employer and a fund normally is one which continues for many years, funds anticipate that the unfunded liabilities which are created by the granting of past service credit will be amortized over a period of time by the stream of contributions from the employer. Indeed, one of the actuarial assumptions upon which a plan's benefit levels (which are directly related to employer contribution rates) are based presumes

¹ Contributory service credits are sometimes referred to as "future service."

² Section 203(b)(1)(B) of ERISA (29 U.S.C. § 1053(b)(1)(B)) and Section 411(a)(4) of the Internal Revenue Code (29 U.S.C. § 411(a)(4)) expressly provide that years of precontributory service with an employer need not be taken into account in determining whether a participant is vested. ERISA Section 204(b)(3)(A) (29 U.S.C. § 1054(b)(3)(A)) and Internal Revenue Code Section 411(b)(3) (29 U.S.C. § 411(b)(3)) are the statutory provisions which mandate what years of service must be taken into account in determining a participant's accrued benefits. Those sections carefully avoid requiring that plans credit precontributory service.

that liabilities for precontributory service will be funded over a period of many years.³

So long as the employer continues to contribute to the fund, the amount of the unfunded liabilities attributable to the grant of precontributory service will decrease. But, if the employer withdraws from the plan before they are funded, the remaining liabilities must somehow be absorbed by the plan. The unfunded liabilities thus "dumped" on a plan can seriously undermine the benefit security of a plan's participants generally. The funding level of the plan as a whole may be seriously compromised. Or, planned benefit increases might have to be postponed until the "dumped" liabilities are eventually funded by contributions from the remaining employers.⁴

Multiemployer funds balance their goal of providing more meaningful benefits to older workers with their concern that the plan's financial integrity not be compromised by the "dumping" of unfunded liabilities by making grants of precontributory service credits contingent upon the continued participation of the employer in the plan.⁵ Multiemployer plans, accordingly, routinely provide for the cancellation, or forfeiture, of retirement benefits attributable to precontributory service when an employer withdraws. Such a provision is often referred to as a "past service disregard rule."

³ Most plans adopt benefit levels embodying actuarial assumptions under which unfunded liabilities are fully amortized over a period of between 30 and 40 years.

⁴ Since the enactment of the 1980 Amendments to ERISA, this dumping would have the further effect of increasing the potential withdrawal liability of all employers remaining with the Fund.

⁵ Only a small percentage of employers withdraw from multiemployer plans leaving unfunded liabilities. In the case of the NSPF, only 26 of the Fund's more than 300 employers left leaving unfunded liabilities.

The practice of making the grant of precontributory service credits contingent upon the continuation of the stream of contributions from an employer is expressly authorized by ERISA. ERISA Section 203(a)(3)(E) (29 U.S.C. 1053(a)(3)(E)) and Section 411(a)(3)(E) of the Internal Revenue Code (26 U.S.C. § 411(a)(3)(E)) clearly provide that a multiemployer plan may cancel the precontributory service credits of the employees of an employer who subsequently "ceases [to make] contributions to the . . . plan." Regulations promulgated pursuant to the Internal Revenue Code also clearly authorize this practice.*

If multiemployer plan trustees were unable to utilize past service disregard rules to protect their funds against the dumping of unfunded liabilities, the practice of granting precontributory service to the workforces of newly participating employers would cease entirely. Without the ability to make grants of precontributory service credit contingent upon the continued stream of employer contributions, no Trustee would regard any grant of past service credit as being prudent.

This is so because no trustee can know in advance whether any particular employer will remain with the fund long enough to fully amortize precontributory service credits originally given to its employees. If the trustees' guess about an employer's longevity with the fund proves wrong, the fund must absorb unfunded liability to the detriment of the benefit security of all participants. Certainly, the trustees who guessed wrong could expect to be defendants in a lawsuit alleging that their decision to grant past service credit was imprudent and therefore a breach of their general fiduciary obligation to the fund participants.

The effect of a cessation of grants of past service credit would be devastating to older workers. The failure to

* 26 C.F.R. § 1.411(a)-4(b)(5); 26 CFR § 1.414(f)-1.

obtain past service credit would effectively prevent the older employees of a newly organized company from ever obtaining a meaningful pension benefit.

If multiemployer pension plans are forbidden to utilize their past service disregard rules when employers withdraw dumping unfunded liabilities, they will be required to absorb hundreds of millions of dollars for which no funding will ever be received.

B. Factual Background

The National Shopmen Pension Fund ("NSPF" or "Fund") is a multiemployer pension fund within the meaning of ERISA.⁷ The Fund was established as a vehicle to fund retirement benefits for employees of participating employers who are covered by collective bargaining agreements with Shopmen Local Unions affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers (the "Union"). It is administered by a Board of Trustees consisting of three representatives of the participating employers and three representatives of the Union. The Fund currently has approximately 17,000 participants and 300 contributing employers.

There have been two Plans adopted by the Trustees since the Fund's creation. The first plan was adopted by the Trustees in 1969. Following the enactment of ERISA, the Plan was amended (in 1976) to comply with the terms of that law.

Both the 1969 and 1976 Plans were submitted to, and approved by, the Internal Revenue Service. The Internal Revenue Service approved the 1969 Plan as being in compliance with applicable provisions of the Internal Revenue Code by a letter received on September 10, 1969.

⁷ All facts are stated in the opinion of the court below and are also set forth in a Joint Stipulation of material facts which was filed with the district court.

The Internal Revenue Service approved the 1976 Plan as being in compliance with the Code, as amended by ERISA, by letter dated May 2, 1978.

The Rules and Regulations of the National Shopmen Pension Fund (the "Plan") provide that retirement benefits are paid to eligible participants on the basis of a formula that takes into account the number of years of credited service with the participant's employer and the employer's contribution rate (i.e., the amount per compensable hour that the employer pays to the Fund). For example, a participant with 25 years of credited service with a participating employer (or employers, since this plan is a multiemployer plan) who contributed at the rate of 50 cents per hour would receive, at retirement, a benefit of \$400.00 per month. If the participant's years of credited service are less than 25, his or her benefits are proportionally less.

As do most multiemployer pension plans, the NSPF routinely grants pension service credits to the employees of newly participating employers for their years of service with their employer before it first joined the plan (and therefore first became obligated to make contributions on their behalf). And, consistent with multiemployer plan practice generally, the NSPF's plan contains a past service disregard rule which expressly authorizes the cancellation of benefits attributable to past service credit upon the withdrawal of an employer. Section 2.09 of the Plan provides:⁸

- (a) If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the Trustees are empowered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible

⁸ Plan participants receive complete copies of the Plan as well as the summary description of it mandated by ERISA Section 102 (29 U.S.C. § 1022).

on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, Employers, nor the Union be obligated to make such payments.

It has been the consistent policy of the Trustees of the NSPF to invoke Section 2.09 *only* in cases where an employer's withdrawal has left the Plan with unfunded (i.e., "dumped") benefit obligations. And, the Trustees *only* invoke the rule to cancel benefit amounts (i.e., accrued benefits) attributable to the years of precontributory service originally granted when the employer first joined the Fund. The vesting status of participants is not affected.⁹

Thirty seven employers have withdrawn from the NSPF between the adoption of Section 2.09 and the enactment of the 1980 Multiemployer Pension Plan Amendments to ERISA. In each instance, the Trustees directed that the Martin E. Segal Co., which provides actuarial and consulting services to the Fund, prepare an actuarial report analyzing the effect of the particular withdrawal on the Fund. Each report calculated the amount of Fund assets attributable to the contributions of the employer involved as well as the amount of the Fund's liability for benefit obligations to the employer's workforce. If the report indicated that a particular termination resulted in the dumping of unfunded liabilities upon the Fund, the Trustees directed that the precontributory service of the employer's employees be cancelled. But, the Trustees would direct that cancellation of past

⁹ Prior to the decision of the Ninth Circuit in *Fentron et al. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982), the Trustees' view was that they were permitted to cancel past service credit for purposes of vesting too. Following the decision in that case, the Trustees modified their prior decisions so that their implementation of Section 2.09 only cancelled past service for purposes of determining benefit amounts (accrued benefits).

service credits be *only* to the extent necessary to eliminate the unfunded liabilities. The total amount of unfunded vested liabilities which would have been dumped upon the NSPF had its Plan not contained a past service disregard rule exceeds 3 million dollars.¹⁰

Anchor Post Building Products, Inc. withdrew from the NSPF in September, 1980, when it permanently closed its Baltimore, Maryland plant and permanently laid off its employees. As was their consistent practice in such instances, the Trustees directed that an actuarial report on the effect of the withdrawal be prepared.

The resulting report disclosed that Anchor Post's withdrawal had left the Fund with vested benefit liabilities for which no funds would ever be received of more than \$750,000. The Segal Company therefore recommended that past service credit be cancelled for all former Anchor Post employees. Even after the recommended cancellations, Segal observed, the Fund would still have unfunded vested liabilities of \$430,000 dumped upon it. The Trustees followed the Segal recommendation and cancelled the past service credit of the Anchor Post group.

Plaintiffs Stewart and Warren were among the group of former Anchor Post employees whose past service credits were cancelled. Both, accordingly, suffered a substantial reduction in the amount of their monthly pension benefits. Stewart's reduced pension benefit was based only upon his 2.7 years of contributory service while Warren's was based upon his 10.4 years of contributory service.

¹⁰ Since the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it has become less likely that Section 2.09 will need to be invoked. But, the need for the rule continues to exist. The fact that liability for unfunded benefits is statutorily imposed upon withdrawing employers does not automatically insure that it is, as a practical matter, collectible.

C. Procedural Background

1. *The Allegations of the Complaint*

Plaintiffs' Complaint alleged that the past service disregard rule contained in Section 2.09 of NSPF's Plan and the cancellation of their past service credits pursuant to it was unlawful on five grounds (each of which was set forth in a separate count). The Complaint, which also sought relief on behalf of a class of all persons adversely affected by the implementation of Section 2.09, alleged that:

1. The mere inclusion of a past service disregard rule in a pension plan is a *per se* violation of the vesting and antiforfeiture rules of Section 203 of ERISA (29 U.S.C. § 1053);
2. the cancellation of precontributory service, even if not a *per se* violation of the statute, constituted a change in Plaintiffs' vesting schedule which triggered a statutory right (pursuant to ERISA Section 203(c)(1)(B)) to elect to have their vested status determined under the vesting provisions applicable prior to the "change";
3. the cancellation constituted an improper decrease in the Plaintiffs' accrued benefits because Section 204(g) of ERISA (29 U.S.C. § 1054(g)) requires all plan "amendments" which reduce accrued benefits to be approved by the Secretary of Labor;
4. the cancellation of precontributory service credits was, in any event, arbitrary and capricious and therefore a violation of ERISA's "sole and exclusive benefit" requirement; and
5. the cancellation violated the terms of the Plan because it was in conflict with the Plan's general vesting and antiforfeiture rules.

2. *Proceedings before the District Court*

The case was submitted to the district court on cross-motions for summary judgment and a joint stipulation of

material facts. In addition to the assertions of illegality set forth in their complaint, the Plaintiffs contended that the question of whether the Trustees' cancellation of Plaintiffs' precontributory service credit constituted an improper change in their vesting schedule had already been decided against the Fund in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 648 (9th Cir. 1982).

On May 20, 1983, the district court entered a decision and order holding that the Trustees' action in cancelling Plaintiffs' precontributory service pursuant to Section 2.09 of the Plan violated ERISA.¹¹ First, the court held that the cancellation was an "indirect vesting schedule amendment" and that such an "amendment" triggered a right, pursuant to ERISA Section 203(c)(1)(B), to have the "vested benefits" of affected participants calculated in accordance with the vesting scheme in effect before the "amendment."¹² In reaching this conclusion, the court held that Section 203(a)(3)(E), which specifically authorizes cancellation of past service credit, was not relevant. Second, the court ruled that the Trustees' determination to cancel Plaintiffs' past service credit was "an amendment" to the NSPF's Plan, within the meaning of ERISA Section 204(g), which reduced accrued benefits and which could not, under the provisions of that section, be implemented until approved by the Secretary of Labor. Again, the court held that Section 203(a)(3)(E) of the Act had no bearing on the matter. The court expressly declined to rule on Plaintiffs' other contentions (i.e., that the cancellation of their past credit was otherwise arbi-

¹¹ The court, in a separate ruling, certified the class requested by Plaintiffs.

¹² The court rejected plaintiffs' contention that the issues before it had already been decided against the Fund in *Fentron* and therefore could not be relitigated. But, the court quoted in (a manner which showed a lack of understanding of its context) language from the Ninth Circuit.

trary and capricious), stating that such rulings were unnecessary.

D. Proceedings Before and Rulings By The Court of Appeals

The Fund and its Trustees timely appealed the district court's ruling. They then sought to obtain an automatic stay pursuant to Fed. Rule Civ. Proc. 62(d) by posting a supersedeas bond. The district court refused to grant a complete stay, however. Instead, it stayed only payment of those benefits which, under its May 20, 1983 decision, would have been due as of June 1, 1983. Holding that Rule 62(d) was inapplicable with respect to future benefit payments, the Court ordered that such benefits be in an amount which included benefits attributable to Plaintiffs' past service.

The Fund promptly sought a complete stay from the Court of Appeals. On July 27, 1983, the District of Columbia Circuit reversed the district court and directed that a complete stay be entered upon the posting of a supersedeas bond. An appeal of this latter ruling was denied by this Court (Justice Byron R. White, in chambers) on August 8, 1983.

On March 30, 1984, a unanimous panel of the District of Columbia Circuit reversed the district court's substantive rulings.

The Court held that the Trustees' application of Section 2.09 of the NSPF's Plan was not a *per se* violation of the vesting and anti-forfeiture rules of ERISA. The court, pointing to ERISA Section 203(a)(3)(E), observed that the statute expressly allowed past service disregard rules such as Section 2.09 of the NSPF's Plan. It observed too that the Trustees' implementation of the rule did not result in a change in Plaintiffs' (or any person's) vesting status. Rather, the Trustees' action only affected accrued benefits attributable to Plaintiffs'

precontributory service.¹³ Implementation of the rule was not, therefore, an "amendment" affecting the vesting schedule of any participant.

The court further held that the implementation of Section 2.09 was not a "plan amendment" reducing accrued benefits which could not become effective without approval of the Secretary of Labor. The implementation of an existing plan provision which is expressly allowed by ERISA Section 203(c)(3)(E), the court ruled, is not an "amendment" within the meaning of ERISA Section 204(g) and therefore needs no prior governmental approval.

In reaching the above conclusions, the court was careful to point out that it was both *lawful and appropriate* for a pension fund to seek to protect itself, through the use of a past service cancellation rule, from the dumping of unfunded liability. Such a goal, it pointed out, was approved by the Ninth Circuit in *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 67 (1983), and the Fourth Circuit in *Baltimore Rebuilders Inc. v. NLRB*, 611 F.2d 1372 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

The Circuit Court recognized that its ruling that past service cancellation rules, such as that of the NSPF, are authorized by ERISA did not fully dispose of this matter. It noted that Plaintiffs' allegation that the implementation of the NSPF's rule was otherwise arbitrary or capricious had not yet been considered. It therefore remanded the case for consideration of whether the rule's implementation actually was necessary to protect the Fund from the dumping of unfunded liabilities.

¹³ The Circuit Court also ruled that the Ninth Circuit's *Fentron* decision did not decide the issues raised on appeal and that the *Fentron* case, therefore, did not govern the case before it.

ARGUMENT

The decision of the court below does not conflict with any decision of any other court of appeals or of this Court. The court of appeals correctly interpreted the relevant provisions of ERISA consistent with the overall statutory scheme, applicable legislative history, decisions of this Court, and interpretations by agencies which enforce the law, as well as long established judicial principles of statutory construction. Accordingly, no further review by this Court is warranted.

1. Petitioners' assertion that there is a conflict between the decision below and that of the Ninth Circuit in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 648 (9th Cir. 1982), simply is not correct. As the court of appeals below noted, the two cases address significantly different legal questions. 674 F.2d at 1557. Indeed, on the ultimate question raised in this matter—whether the unilateral application of a multi-employer pension plan past service disregard rule is *per se* unlawful (as Petitioners contend)—the two circuits are in complete agreement. Both hold that such rules may be invoked to cancel past service credit for purposes of benefit accrual so long as they are not applied in an arbitrary or capricious manner. Compare the decision below with *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), cert. denied, 104 S.Ct. 67 (1983).¹⁴

Petitioners contend that a conflict exists because the Ninth Circuit, in *Fentron*, ruled that the use of the NSPF's past service disregard rule in that case was a "plan amendment" while the District of Columbia Circuit ruled that the Fund's use of the rule with respect to them was not a "plan amendment." While it is true that both courts discussed the question of whether the respective

¹⁴ The court below itself noted that: ". . . our interpretation is fully consistent with the Ninth Circuit on this issue." *Id.* at 1565, fn. 29.

cancellations constituted a "plan amendment," the discussions were in entirely different factual, and therefore different legal, contexts. Moreover, the court below dealt with the question of what constitutes an "amendment to the plan" in the context of ERISA provisions which were not discussed or at issue in the *Fentron* litigation.

A brief discussion of the relevant statutory provisions and the respective actions taken by the Trustees in the two cases will make this point apparent.

ERISA Section 203(a)(3)(E) expressly permits multiemployer pension plans to cancel accrued benefits of participants attributable to service with their employer before it first became a contributor to the fund if that employer later withdraws from the fund. Such cancellations are exceptions (along with others described in Section 203(a)(3)) to ERISA's vesting and antiforfeiture rules. ERISA Section 203(c)(1)(B) provides that no "plan amendment" which changes the vesting schedule of any participant who has five or more years of vesting service credit may take effect unless such participants are given the option of being treated under the vesting schedule in effect prior to the amendment.

In *Fentron*, the Trustees of the NSPF implemented the plan's past service disregard rule (Section 2.09) to cancel the precontributory service credits of the Fentron employee group when that company left the plan, dumping upon it unfunded liabilities in excess of \$500,000. The Trustees, following Fentron's withdrawal, used Section 2.09 to cancel past service credits both for the purpose of determining whether the Fentron employees would meet the plan's vesting rules as well as for the purpose of calculating benefit amounts accrued. No previously vested Fentron employee retained sufficient contributory service to meet the NSPF's vesting rules after the cancellation of his or her precontributory vesting service credit. Therefore, such participants were divested entirely by the Trustees' implementation of Section 2.09.

The Ninth Circuit held that the use of the Fund's past service disregard rule to entirely eliminate the vested rights of the participants was a *de facto* plan amendment changing the plaintiffs' vesting schedule and that such unilateral changes violated ERISA Section 203 (c) (1) (B). That court did *not* address the question of whether a past service disregard rule could be applied if only accrued benefits attributable to past service were cancelled (since that question, in the factual context of the case before it, was irrelevant). Indeed, the *Fentron* court never even discussed Section 203(a)(3)(E) or its predecessor provision.¹⁵

The implementation of the Fund's past service disregard rule in the instant case was quite different from that in *Fentron*. As was previously noted, the Trustees, after the *Fentron* decision, only implemented Section 2.09 to cancel precontributory service for purposes of benefit accrual. Hence, when Petitioners' employer (Anchor Post) withdrew from the Fund, dumping upon it unfunded vested liabilities in excess of \$750,000, Section 2.09 was used to cancel *only* accrued benefits attributable to precontributory service. Petitioners' vesting status was not affected in any way.¹⁶

Petitioners asserted below that the application of the NSPF's past service disregard rule to cancel their precontributory accrued benefits was no different than the action which the Ninth Circuit found to be a violation of ERISA Section 203(c)(1)(B). They contended that they too were adversely affected by a plan amendment which unilaterally changed their vested rights.

¹⁵ Prior to the 1980 Amendments to ERISA, the provision authorizing past service disregard rules was contained in the Act's definition of "multiemployer plan." ERISA Section 3(37) (29 U.S.C. § 1002(37) (1980)).

¹⁶ This latter fact is crucial to an understanding of the difference between *Fentron* and the instant case.

The court below recognized that this was not so. It understood that Petitioners had failed to comprehend the difference between the concepts of vested rights and accrued benefits embodied in the Act.¹⁷ 730 F.2d at 1561-62. Citing the opinions of this Court in *Nachman Corp. v. PBGC*, 446 U.S. 359, 372-73 (1980) and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the court below noted that, in the instant case, the Trustees' use of Section 2.09:

changes only the amount of benefits a pension receives, *not* his vested status. *It cannot be construed as an amendment to the vesting schedule.* [latter emphasis added]

"A reduction in accrued benefits, standing alone," the court pointed out, "does not affect the right to obtain benefits and thus does not affect vesting." 730 F.2d at 1562. Since the implementation of the Fund's past service disregard rule to the former Anchor Post employees had no affect on their vested rights, the court below ruled that there was *no* "amendment" to the NSPF's vesting schedule.

As the foregoing demonstrates, the rulings of the District of Columbia and Ninth Circuits are not in conflict. In *Stewart* and *Fentron*, the two circuits were faced with different legal questions. The Ninth Circuit, in *Fentron*, decided that a past service disregard rule could not be used to cancel the precontributory vesting service

¹⁷ "Accrued benefits" are those benefit amounts to which a fully vested plan participant would be entitled upon retirement. ERISA Section 3(23) (29 U.S.C. § 1002(23)). The concept of "vested rights" (ERISA actually uses the term "nonforfeitable rights") refers to that percentage of a participant's accrued benefits to which the participant (by virtue of his or her credited years of vesting service) has an unconditional claim. ERISA Section 3(19) (29 U.S.C. § 1002(19)). Under the rules of the NSPF's Plan, participants become 100% vested in their accrued benefits (of whatever amount) upon the attainment of 10 years of vesting service credit.

credit of participants who had previously been vested because such action would violate ERISA Section 203 (c) (1) (B). In the instant matter, the District of Columbia Circuit held that a fundamentally different action by the Trustees—the cancellation of past service credit for benefit accrual purposes only—was not a violation of that provision.

One other observation must be made about the “conflict” which Petitioners claim exists. The court of appeals below also ruled that the implementation of Section 2.09 of the Plan to cancel Petitioners’ precontributory service was not a “plan amendment” within the meaning of ERISA Section 204(g). But, Section 204(g), which prohibits “amendments to [a] plan” which reduce accrued benefits unless they are first approved by the Secretary of Labor, was neither discussed nor at issue in the *Fentron* litigation. See 674 F.2d at 1306, fn. 8. Accordingly, the ruling below that the Trustees’ invocation of the NSPF’s past service disregard rule was not a “plan amendment” within the meaning of Section 204(g) is not in conflict with the decision of the Ninth Circuit in *Fentron* either.

2. In ruling that a past service disregard rule, such as that contained in the NSPF’s plan, could lawfully be used to cancel the past service credits for purposes of benefit accrual of participants whose employer withdrew from the plan (so long as it is not used in an arbitrary or capricious manner), the court below followed the guidance which this Court gave in *Nachman* concerning the manner in which ERISA is to be construed. The court carefully looked at the specific language of the statutory provisions involved, their relationship to the overall statutory scheme, relevant legislative history, and the interpretations given to the provisions by the agencies charged with administering the law.¹⁸ The court’s consideration

¹⁸ See 730 F.2d at 1560-65. Indeed, the IRS has promulgated a regulation in which an example demonstrating the proper use of a past service disregard rule is included. *Id.* at p. 64, fn. 27.

of those factors led it to conclude that: ". . . actions which are specifically permitted by ERISA Section 203 (a) (3), and which are carried out under authority reserved by the pension plan without actual *amendment* of the plan, are not subject to the procedures outlined in Sections 203(c)(1)(B) and 204(g)." 730 F.2d at 1565. A review of the circuit court's unanimous decision clearly shows that it properly interpreted the statute consistent with the opinions of other courts of appeals (especially that of the Ninth Circuit in *Elser, supra*) and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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